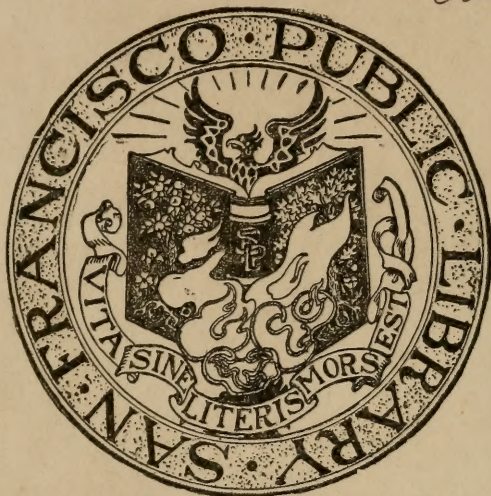




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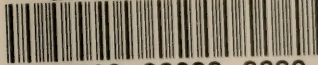
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AMERICAN
STATE TRIALS

A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to the Present Day.

WITH NOTES AND ANNOTATIONS.

JOHN D. LAWSON, LL.D.
EDITOR

VOLUME XVII

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AMERICAN
STATE TRIALS

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To

JOHN HENRY WIGMORE, A.M., LL.D.,

EMERITUS DEAN OF THE FACULTY OF LAW, NORTH-
WESTERN UNIVERSITY, DISTINGUISHED JURIST AND
AUTHOR, THIS VOLUME IS DEDICATED IN MEMORY
OF THE FRIENDSHIP EXISTING BETWEEN HIM AND
THE EDITOR, AND BECAUSE OF THEIR COMMON
ZEAL FOR THE REFORM OF CRIMINAL PROCEDURE
IN THE UNITED STATES.

INTRODUCTION

In planning and producing this American State Trials Series John Lawson rendered a service of the highest importance to the legal profession. This service contributed both to the advancement of legal science and to the daily needs of the practitioner.

The applied science of Law involves not only its system of principles but their application to concrete facts. This application may be studied in two chief bodies of recorded data, viz., in the transactional instruments of trade and industry and in the conduct of trials in court. The latter body of records is indispensable, in any system of law, for showing us how the principles work in practice.

Yet (oddly enough) in our inherited system no official provision is made for preserving the knowledge of it. The traditional court-record, as handed down for seven centuries, breaks off with the impanelling of the jury and then resumes with the verdict. The gap between these two entries represents the trial itself, of which no record is officially preserved. Thus the preservation of that knowledge is left to private unofficial enterprise.

In England it was frequent for one or both of the parties, or for some outsider, afterwards to print a report of the trial in a pamphlet. From time to time collections of such reports were published; and finally came Howell's great series, the "State Trials", covering three centuries; with its continuation (starting a century ago) the "State Trials New Series". This has been ultimately succeeded by Hodge's unexcelled

“Notable British Trials Series”, still flourishing in its sixty-odd volumes.

But in the United States this wealth of scattered material was left unshepherded for a century, until John Lawson conceived the great plan of gathering and editing them in the American State Trials Series. The extensive labors involved can be seen by a perusal of its annotations; and the careful and critical editorial skill devoted to the Series is what gives it such a high claim to a place in our legal literature. It has for the first time made this rich body of materials accessible permanently to students of our legal history and practice in all parts of our country.

Such is its service to legal science.

But to the practitioner also, particularly to the advocate, it is equally serviceable. The ambitious advocate preparing for an important trial on any of the greater issues (homicide, robbery, seduction, fraud, embezzlement, and so on) must wish to consult the tactics of his predecessors,—their examination of witnesses, their marshalling of the evidence, their speeches to the jury, and their handling of those moral issues, outside the strict rules of law, which lie behind most great controversies. Here is where he will find that human nature incessantly repeats itself, and that professional problems and professional skill have had common experiences and common lessons in all times and places.

And this is the second great service rendered by John Lawson’s work.

His career as an author had been a notable one. His wide professional interests had involved coöperation in many professional activities,—the State and the American Bar Associations, the American Institute of Criminal Law and Criminology, the International Law Association, the American Prison Association, the National Conference of Commissioners on

Uniform State Laws, and others. But upon this American State Trials Series he labored during twenty years, looking upon it as his magnum opus. The first volume, appearing in 1914, was dedicated to his friend William Keeney Bixby of St. Louis, whose beneficent interest made possible the collection of materials, and these were placed in the Library of the University of Missouri Law School.

Interrupted in its publication by the untimely passing of its great editor, the Series now resumes its publication with the 17th volume. There remains a large and varied field of valuable material, both of the present and of past periods, which ought ultimately to be incorporated into the Series. It is to be earnestly hoped that the profession will respond with substantial support, so that these informative treasures of our practice may be preserved for generations to come.

JOHN H. WIGMORE.

PREFACE TO VOLUME SEVENTEEN.

To the last volume in this Series, published eight years ago, the distinguished editor gave the name, "The Book of Great Speeches." To this volume the name might well be given "The Book of Interesting Variety," for never before has one single volume contained so many trials, all differing widely in fact situations, but containing so much that is designed to stimulate and hold our interest. We pass from mass action in labor troubles and a Lindbergh case of fifty years ago to a case vaguely reminiscent of "Frankie and Johnnie" famed in American folklore. And then we find an "American Tragedy" quite similar to the plot of Dreiser's famous novel. We pass on through "libel" troubles, to the trial of a woman for poisoning her husband. Then, we study the laws against duelling and close with one of the most terribly fiendish murders ever perpetrated. Except for Volume XV, devoted to California cases, and Volume VIII, largely composed of materials taken from the trials of the conspirators to assassinate President Lincoln, Dean Lawson made no effort to classify his trials according to subject matter. Undoubtedly that was a wise policy to follow. In the first sixteen volumes the trials of seventy persons, indicted for murder, were presented. The constant reading of murder cases would appall all but the most avid readers of "horrors," but when we find them interspersed with other trials of a wholly different nature, we may read them with pleasure and profit. So, perhaps, the title, "The Book of Interesting Variety," should be given to

almost all of this Series—but no volume deserves the designation more than does this one.

Dean Lawson should be writing this Preface if only to express himself upon the trial of *Harry E. Wootton* (p. 1) for kidnaping, at Tombstone, Arizona, shortly after the close of the World War. This was no common kidnaping case, but grew out of the famous "Bisbee deportations," July 12, 1917, when the sheriff and numerous deputies rounded up more than eleven hundred copper mine strikers, forced most of them into railway cars, and carried them out to the desert country of New Mexico, where they were released. Having read his Prefaces to other volumes containing cases involving sedition in war times, we imagine that the forcible "kidnaping" of the strikers, many of whom were members of the I. W. W., or sympathizers, and quite willing to embarrass their Government when copper production was so necessary, would meet his approval. In fact, the way in which his narrative was written and the trial edited confirms this belief.

Certainly, although Wootton and the several hundred other deputies were not ordinary kidnapers, they did "forcibly take, arrest, and convey into the State of New Mexico, without right under State or Federal laws, one Fred W. Brown, in violation of section 185 of the Penal Code of Arizona" as charged in the indictment. How could this charge be defended? The unique idea of "community or collective self defense" was used and, with the acquittal of Wootton, of course the cases against the others were dropped.

As argued by Mr. William Burges for the defendant in his *opening statement* (although argument should have no place at that point in the trial), "Ne-

cessity knows no law." He claimed that "a man does not have to wait to see whether his adversary is shooting at him with blank cartridges." When an assailant has avowed his purpose that when he meets the defendant he will kill him "it is the defendant's duty to get into action and get in quick." (pp. 27, 28.) The community has the right of self defense if such action is reasonably necessary. And that necessity is the main question in this trial, and here opinions will vary greatly.

We imagine that Dean Lawson would hold that the deportations were justifiable. It was a time of War. Copper, of course, was an absolute necessity. Moreover, the activities of the I. W. W., all over the country, smacked of treason. While there is no showing that the I. W. W. brought about the Arizona copper mine strikes, it was generally so thought. If there was no actual danger to the community, there was undoubtedly a vast potential danger. While the strikers were orderly up to the time of the deportations, the refusal of laborers, five out of six of foreign origin, to work at good wages to get the precious copper, stood out in sharp relief against the sacrifices of American citizens supporting the War with patriotic devotion. Just as in the ordinary self defense case, the jurors must be told to look at the question of apparent necessity through the "eyes of the defendant," as of the time of the homicide, not through their own eyes, months later, and under other circumstances. Through the eyes of Bisbee citizens, this sullen refusal to work had the appearance of treason, or at least a dangerous lack of sympathy for existing emergencies.

So the community "acted" and, after the War was over and things had quieted down, one of the actors

was chosen for trial to vindicate the laws in the statute book. It was a difficult case to bring to trial in a partisan district and 2,480 men were drawn before a jury of twelve was secured to render a verdict. Once it was ruled by the trial judge that the history, general teachings, and doctrines of the I. W. W., as shown in extracts from general literature, could be considered in determining the situation in the copper mine district, it was easy to convince the jury that the people of Bisbee *felt* that they were in imminent danger, even if their fears were ungrounded. And if that is true, there can be no quarrel with the outcome of this case. When a jury listens to the trial of a person who had "defended" himself against a friend under the reasonably mistaken idea that he was an assassin or a burglar, the true state of facts are not weighed against him. Nor can the true facts later be used against a community.

Nevertheless, it is interesting to consider the "justification" of the citizens of Bisbee in this mass deportation. *The New Republic* for December 8, 1917, paints a different picture of the facts:

"On June 27, 1917, the employees of the Copper Queen and of the neighboring properties, the Calumet and Arizona, and the Shattuck, Arizona, went out on a strike. On July 12, 1917, an armed mob, under the nominal leadership of the county sheriff, overwhelmed eleven hundred and eighty-six strikers and their alleged sympathizers, herded them aboard a train of cattle and box cars, especially provided by the El Paso and Southwestern, a subsidiary of the copper companies, and under the muzzles of rifles, revolvers, and machine guns deported them into the New Mexican desert. One man was killed while defending his home against illegal invasion. Others had their scalps and bones broken. The ranking offi-

cer of the Phelps Dodge corporation in Bisbee had given out an interview in which he denounced the strikes in Bisbee and the other copper camps of Arizona as of pro-German origin and advocated deportations as the patriotic remedy."

Two months later, since the copper mine troubles continued, President Wilson appointed a Commission headed by his Secretary of Labor Wilson, to report the truth. This Report, prepared by the Commission with Felix Frankfurter of counsel, declared that the strikers had some real grievances. The Phelps-Dodge Corporation had the "no conference—no compromise" attitude. Moreover, the Commission could find no justification for the belief that violence was contemplated. "An experienced officer of the United States Army, sent to Bisbee at the request of the Governor of Arizona, reported that 'everything was peaceful and that troops were neither needed nor warranted under existing conditions.'" And there was considerable testimony of the same kind from others who were "without bias." The Report recommended prosecution of those responsible for the deportations.

The Survey for the same week also discussed the Report of the President's Commission and emphasized the facts shown therein—that the deportees were for three days without shelter, food, or adequate water, and were abandoned in the desert by their guards and left to shift for themselves until cared for by the United States Army. It mentions that at the mass-meeting of July 11, preceding the deportation, there was active participation by the managers and officials of the copper mines and they "purposely abstained from consulting with the United States Attorney or other legal advisers."

It appears that of the deported men 433 were married, 468 were citizens of the United States, and 472 were registered under the Draft law. Very few represented nationalities which were at the time at war with the United States. Other contemporary publications indicate that the Bisbee deportations were hasty acts of cruelty done out of hatred of the I. W. W., a spirit erroneously fomented by the copper mine owners and officials. Some infer that an easy solution of the problem through emergency legislation was quite possible¹ and that the extra-legal action taken made capital-labor relations strained for months to come.

So there are two sides to the picture. Some will say, "That is the way to deal with wobblies. Catch them and run them out." But others will contend that the use of the doctrine of community self defense was utterly unwarranted, and that the whole affair was a wanton invasion of private rights by an intolerant capitalistic group temporarily in power.

"He died like a dog, as was fit." Thus an old time New York chief of police, George W. Walling, describes the death of Joseph Douglass (often spelled Douglas), who while dying confessed that he and William Mosher were guilty of kidnaping little Charley Ross of Germantown.² Douglass and Mosher had been shot down while attempting to burglarize the home of Judge Van Brunt of the New York Supreme Court. Mosher was instantly killed and Douglass lived just long enough to gasp his confession but not to tell what had become of the child. Both had been under suspicion for some time and *William H. Westervelt*, Mosher's brother-in-law, had been asked to

¹ See *The Survey*, July 21, 1917, p. 353.

² *Recollections of a New York Chief of Police*, p. 208.

assist in finding the two men and in recovering the child. Chief Walling says:³

“After considering the matter a few days he agreed to help the police. I freely confess that Westervelt’s entrance into the Charley Ross case was unfortunate. I well knew his relationship to Mosher. ‘Set a thief to catch a thief’ may be a good method, but I am forced to say it failed utterly in this case. I thought, as did many with whom I consulted, that Westervelt could be induced, by a share in the reward, to inform where the child was. I do not think Westervelt knew where Charley Ross was. But that he took some part in the abduction I feel positive to this day. . . . It is certain that when Westervelt was aware that we were on the track of his brother-in-law he put Mosher and Douglas on their guard. . . . It was one of the most delicate and difficult of cases. I sometimes dreaded that if probed too closely one of the ruffians would murder the child, so as to efface all traces of the crime of abduction.”

During the negotiations Westervelt admitted that he had met with Mosher and Douglass. Now they were dead and their lips sealed, so the authorities concentrated upon Westervelt and he was taken to Philadelphia and convicted of conspiring to abduct the child. (p. 176.)

Poor little Charley Ross! That was the theme of many a poem and song for years to come. Nothing to this day has ever been learned about the fate of the child. As Chief Walling said:⁴

“I think he is dead. I can conceive of no possible reason why, after the two kidnapers had

³ *Ibid.* p. 203.

⁴ *Ibid.* p. 208.

been killed and Westervelt was in prison, Charley Ross should not have been returned had he been alive. The promised immunity from punishment and the reward offered by the Mayor of Philadelphia are good reasons for supposing that the child, if alive, would have been returned to its parents."

It is reported that the bereaved family spent more than fifty thousand dollars immediately after the abduction in a vain effort to find the boy. The police of Philadelphia conducted a thorough search from house to house, and for many years thereafter countless clues were sifted in vain. The Ross case remains the outstanding unsolved problem in the annals of American Crime. The trial of Westervelt, containing the testimony of members of the family and the prisoner's "story" (see pp. 209-215), is the chief source of information for this tragedy which shocked the Nation. As might be expected, the Ross case left its imprint in the substantive criminal law, because the notoriety of this affair resulted in legislation in many states changing the abduction offense to kidnaping with very severe penalties. Many of these statutes were made even more harsh following the recent Lindbergh kidnaping.

The trial of *Mary Harris* (p. 233) for the murder of Adoniram J. Burroughs created great excitement in Washington, D. C., even in 1865, a most eventful year. The young girl, who shot down her former sweetheart in the Treasury Department, attracted a host of sympathetic friends. Even Mrs. Lincoln was interested in her case. The defense was "paroxysmal insanity" brought on, as declared by a defense expert, by "severe congestive dysmenorrhoea, arising in most part as a consequence of the irritability of

the uterus; and such uterine irritation always affects the nervous system." This "expert," Dr. Calvin M. Fitch of Chicago, came to this conclusion, while admitting that "all that I know of the case was what I saw. . . . I do not think any of my visits extended beyond fifteen minutes." As to his qualifications he said, "As an expert on insanity, I have the same acquaintance with it that any educated physician is expected to have." Alas! In 1865 few educated physicians were expected to have any real acquaintance with this difficult problem, baffling even to specialists of this day. Dr. Charles H. Nichols, Superintendent of the Government Hospital for the insane, also came to the rescue of the defendant. He visited her in her room in the jail four or five times and "conversed with her with a view to ascertain her mental and physical condition." He also listened to the evidence given at the trial. He found that her brain and nervous system were "large and active," but, also, "both her physical constitution and health, and her mental and moral constitution are such as to render her unusually susceptible to either a physical or moral cause of insanity."

As might be expected the prosecution contended that this girl was not insane and the assistant prosecutor later commented upon the defense as "a refuge always sought in cases where other refuge there is none." To him Miss Harris found her lover lost to her, married to another and "she was jealous; her love turned to hatred, her passion to revenge," and so she shot him with a Sharpe's four barrel revolver. Here we have a battle between lawyers and experts on the insanity issue, the prosecution condemning the "mad doctors" and extolling the merits of their "common-sense doctors," while the

defense heartily contended that Mary Harris' act was no crime since it had its basis in disease. Fortunately, for the defense, the defendant was young and attractive and the jury took only five minutes to return a verdict of not guilty.

Perhaps that was just. Who knows?

The trial presents in a grotesque way the intense partisanship of counsel in a criminal trial and no trial ever reported more adequately illustrates the forensic "contest" between officers of court. The lawyers hold the spotlight and the judge is a mere umpire when appealed to by counsel. His instructions are very brief and nowhere does he seem to dominate the proceedings. Several points of procedure may be discussed in connection with this trial, but particularly interesting is the conduct of counsel representing both sides.

First. Let us consider the opening statements. It is the right and duty of the prosecuting attorney to open the case by a statement to the jury. The object is to show the jury the issue before them, and prepare them for the evidence. "The attorney should state shortly what facts are necessary, and are relied upon as constituting the offense, and what proof he expects to offer."⁵ The opening statement is to clarify the issues so as to assist the jury to distinguish between the important and the unimportant. It is particularly valuable to a jury in a long case in order to determine the weight of the testimony given by witnesses. Neither the state nor the defense, which follows, has any right to give evidence, unsworn and not subject to cross-examination, in the opening statements. As stated by the Illinois Supreme Court:

⁵ Mikell's ed. of Clark's Criminal Procedure, p. 532.

“The attorney for either side is privileged to make an opening statement of what he expects to prove. The purpose of such a statement is to advise the jury concerning the questions of fact involved and to prepare their minds for the evidence to be heard. The extent of the statement and how full it shall be made, within reasonable limits, is left to the discretion of the attorney, but the only purpose is to give the jury an idea of the nature of the action and defense. To relate the testimony at length will not be tolerated.” (Peo. v. Hamilton, 268 Ill. 396.)

In other words, the rules of debating might be followed. Just as the first speaker for the affirmative shows what he expects to prove after laying down the issues of the debate, the prosecutor opens the case against the defendant.

Edward C. Carrington, District Attorney for the District of Columbia, dwelt long upon the law. In fact, his remarks were in the form of the usual judicial charge to the jury at the conclusion of the evidence. And then he made a flowery appeal to the passions of the jurors: (pp. 239-240.)

“Her object was accomplished, her revenge was satisfied! the body of her victim lies bleeding at her feet. You see the flash, you hear the report, and in a moment the poor, trembling spirit of Adoniram J. Burroughs stands affrighted and appalled before the bar of eternal justice. Horrible, horrible, most horrible! Cut off in the very blossom of his sins, no reckoning made, unhouseled, and unannealed, he goes to his long account with all his imperfections on his head. . . .

‘Revenge, sweet at first, bitter ere long,
Back on itself recoils.’
Is this some terrible dream?”

Joseph H. Bradley, for the defense, was not dismayed at this outburst in the government's opening. In an excessively long opening he detailed all the minutiae of the defense, chiefly based upon the events leading up to this tragedy precipitated by a young girl whose spirits once were "cheerful and happy—birdlike; her manner full of life and animation. The livelong day was a day of happiness to her." Now, by the conduct of the deceased all was changed. This "pure, virtuous, chaste, delicate little girl, not more than twenty years of age at this time, whose frame is wasting away and whose spirits are gone, whose heart is broken, in a paroxysm of insanity has slain the man who has brought upon her all this suffering."

He discusses the ninety-two letters, received from deceased, when they had not yet been authenticated nor received as evidence; he gave all the details of "attacks and seizures" suffered by defendant as the disease developed and in some instances his accounts were not later substantiated by his own witnesses; he took pains to emphasize the chastity of defendant and anticipated an interview held by a witness with defendant after the shooting, wherein she had stated, "As God is my judge, I am pure"; and throughout the entire performance he served as judge, witnesses, and exhorter for his client!

Second. Consider the arguments of counsel. After the evidence has been introduced and each side has rested its case, the counsel address the jury. As will be seen in the *Wootton* case (p. 91) and in the *Cluverius* case (p. 414), in many jurisdictions the judge's instructions or charge to the jury precede the arguments, but it is usual to find the arguments devoted to a summing up of the evidence and arguing the question of its effect and sufficiency before the

judge gives the case to the jury. Again to consider the rules of debating, arguments by counsel are much like rebuttals. Counsel must keep within the facts of the case, and must be careful not to misstate the evidence, or make improper remarks.⁶ There are no specific rules for arguments and generally they are controlled by the trial court. This may affect to some degree the conduct of the prosecutor, because unrestrained zeal by him may later lead to a reversal. But, if the judge is weak, there seem to be no limits to the defense lawyer's argument. However, *counsel are supposed to draw their inferences from the evidence and stay within the facts of the case.*

The Harris trial indicates many things which counsel should *not* do. The argument of defense counsel, Daniel W. Voorhees, was a remarkable forensic effort, no doubt. It left the court room in tears. It contained an unjustified and rather nasty attack upon a witness for the prosecution, a Christian minister of good reputation; he attempted to tarnish the reputation of the deceased in a way not even remotely based upon the evidence in the case; he mixed up quotations from standard medico-legal texts with personal assumptions of his own; he declared how certain witnesses could have testified if they had been present at the trial; and wound up in a state of frenzied emotion in which sentimental appeal rode high down a torrent of words of poetic and religious fervor.

After letting the defense have its say, the chief prosecutor, Mr. Carrington, arose to do likewise. He had his stock of Biblical, Shakespearean, and other quotations and one made to order for his case—the familiar,

⁶ Mikell, *op. cit.* p. 539.

“Heaven has no rage like love to hatred turned,
Hell has no fury like a woman scorned.”

At once he began, in his turn, an attack upon one of the defense witnesses, clearly but erroneously inferring that her millinery establishment was a house of ill-fame. But defense counsel interposed an objection and the trial judge cautioned him not to pervert or misstate the evidence. Carrington's excuse was merely that one of *his* witnesses had been attacked in the defense argument, and an unseemly bickering ensued. Later, he again resorted to the matter and Mr. Bradley for the defense declared that he abused “the character of the gentleman.” The prosecutor replied that “I return the insult; your conduct has been ungentlemanly.” Then Mr. Bradley retorted that he despised Carrington and challenged him, thus: “Here is a chip on my head: come and knock it off.”

As he warmed up the prosecutor pooh-poohed the scientific testimony on insanity and laid himself open to the following:

“Now gentlemen of the jury, if this be science, as they understand it, in my judgment, it is time that the great portion of us, I include myself among the number, should be dressed in strait jackets, and locked up in the insane asylum.”

Mr. Bradley: “I agree.”

Later, he sneered at the fact that defense counsel were in tears and Mr. Bradley spoke out, “If you had half as much sensibility as we have you would cry also.” This provoked a wild outpouring of sarcasm, culminating in a poorly disguised inference that Mr. Bradley practiced criminal law by *furnishing evidence* for his clients. In fact, Mr. Carrington so over-

stepped the orderly bounds of decent argument that we may well believe that he lost his own case.

What a contrast to the quiet and thorough presentation of the evidence by England's great prosecutor, Sir Richard Muir! Some of the most successful prosecutors in this country also followed the practice of building up the proof to the point where *it spoke for itself*. In fact, the tactics shown by Mr. Carrington ordinarily do more harm than good. Where evidence is lacking strong words will not supply that need.

And where was the judge? There's the key to the situation—judicial control of the trial. A trial, such as the one we deal with here, is impossible under a dominant, courageous judge, armed with the power and precedent of managing his own court, and not merely "Present But Taking No Part."

The trial of *Nathaniel Jennison* (p. 374) for assault and false imprisonment at Worcester, Massachusetts, in 1783, presents again the problem of abolition of slavery. The trial came to a speedy conclusion following the statement of Chief Justice William Cushing that:

"Our Constitution of Government [Bill of Rights, 1780], by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves."

This settled the slavery question for Massachu-

⁷ This is the title of an article by Judge Cartwright of the Illinois Supreme Court, found in Volume X of the Illinois Law Review, p. 537, which dealt with the impotence of trial judges.

setts and by 1804 all other Northern States had dis-established slavery by statutes which prescribed freedom, upon their attaining specified adult ages, for children born thereafter. It is only just to remark that in these States the growing season was too short for the plantation system to flourish and only a small number of Negroes had been imported for domestic and incidental service. Moreover, the social concern with any race problem was less acute and the status of Negroes might be changed with little disturbance to the prevailing order.

About the time of the Jennison case an attempt was made in Maryland and Virginia to provide for emancipation but it failed; farther South there were few proposals of any sort to stamp out this growing curse, although private manumission was not uncommon. How much suffering would have been avoided had the doctrine announced by the Chief Justice swept the country!

The evidence presented in the murder trial of *Thomas J. Cluverius* (p. 379) of Virginia, in 1885, discloses an "American Tragedy" in the drowning of his sweetheart cousin, who soon would have become a mother. The defendant, who had recently become engaged to another girl, contended that the deceased was not murdered but committed suicide, and the evidence against him was all circumstantial. Nevertheless, he was convicted, after a trial lasting thirty days, and was sent to the gallows. From the beginning to the very end, he protested his innocence and his conduct immediately preceding his execution was not that of a guilty man. Upon his appeal to the Virginia Supreme Court, the Court gave careful consideration to all assignments of error and affirmed the judgment

of the trial court in an opinion of 112 pages. (81 Va. 787.)

“Now, all the circumstances of *time, place, motive, means, opportunity* and *conduct*, concur in pointing to the prisoner as the perpetrator of the crime, and ‘must produce a moral, if not absolute, certainty of his guilt.’

The jury were fully justified in finding their verdict; and the trial court did not err in refusing to set that verdict aside.”

It should be mentioned, however, that Judge Hinton wrote a dissenting opinion in which he stated that the facts are “certainly not absolutely inconsistent with the innocence of the accused of the crime of murder.”

There always will be doubt remaining when a defendant in a notorious case suffers the death penalty where conviction is based upon circumstantial evidence. Moreover, in this case there was much conflicting personal identity testimony, and the matter turned upon a watch key and mustache worn by defendant, both differing widely in descriptions by the many witnesses. But Cluverius had able counsel and the evidence so convinced the jury that they took only two hours for a verdict, and it convinced all but one of the members of the Supreme Court, who re-examined it with great care.

The jury speeches are more adroit than in the Harris case, *supra*. Naturally, the first argument for the State referred to the late Civil War and called upon the jurors to be soldiers and guard the “daughters of Virginia” by convicting the accused. Naturally, the first speaker for the defense, Mr. A. B. Evans, displayed great respect for the jury:

“It is a subject for congratulation for the defense to know that the prisoner at the bar is not to be convicted upon the argument of counsel for the prosecution, clothed in the beautiful figures of rhetoric, roving among the vales of fancy, going back to the days of Judas Iscariot, of Eugene Aram, of John C. Colt, of Benedict Arnold. But you, gentlemen, are under the obligation of an oath that you have taken to hear the evidence under the light of the law that is to govern in this prosecution and to find a verdict that is founded upon evidence. . . .

“I had a thousand times rather appear before a Virginia jury defending the oppressed around whom the rope had been coiled . . . than to be the hired aid of the Commonwealth to prosecute him and to cry for his blood.”

As might be expected he concluded with reminding them of their “awful responsibility.” H. R. Pollard, also speaking for the defense, evidently was a great Bible student for his speech blossomed with religious fervor. W. W. Crump, closing for the defendant, largely confined himself to an unemotional examination of the evidence and attempted to discredit the identity testimony of state’s witnesses. Prosecutor Meredith ended the arguments with an orderly and logical plea for a conviction.

All these speeches should be compared with those mentioned in the Harris case, *supra*. As the ones there show speeches as they should not be made, the ones here are a fair example of the legitimate bounds of arguments of counsel. Perhaps the fair restraint of the prosecutors of Cluverius tipped the scales against him.

A New York woman, embroiled in litigation, heard rumors that opposing counsel were circulating reports

reflecting upon her good name. So she resorted to a newspaper for relief and therein she printed a justification of her own actions and heartily condemned her supposed traducers, charging them with very unprofessional conduct. She went too far and as a result *Martha Bradstreet* (p. 507) was prosecuted for libel in New York City, 1817. Following an instruction by the trial judge that her guilt depended upon a finding of malice she was acquitted.

This Collection has presented a dozen or more libel trials, including the famous trial of John Peter Zenger (Vol. 16, p. 1), and it is of interest to see the distinction between the civil action for libel and the criminal prosecution. Libel is the malicious publication of any defamatory matter tending to expose any person to hatred, contempt, or ridicule. The gist of criminal libel is not injury to the plaintiff's reputation, as in civil libel, but the fact that the libellous statements corrupt public morals, incite to violations of the criminal law, or provoke a breach of the peace. In other words the criminal courts are not so much interested in the injury done to the prosecuting witnesses as they are interested in determining whether the statements were calculated to provoke retaliation. As a result Mrs. Bradstreet's motive or intention in printing the attack upon her legal opponents was a matter of great importance. If she had reason to believe the charges she made and printed them in defense of her own conduct and character, she would not be guilty. The real reason for her outburst seemed to lie in the fact that as a married woman she was not allowed to vindicate her wrongs in the courts.

The trial of *Hannah Kinney* (p. 535) resulted in the acquittal of another woman charged with murder, this time for poisoning her husband with arsenic.

The trial, held in Boston in 1840, was featured by a brilliant opening statement by S. D. Parker for the prosecution and fine logical addresses by counsel for both sides after the evidence. As might be expected, some heat was generated but it was distinctly "professional" and Judge Shaw's long charge to the jury, containing much comment upon the evidence, was kindly and temperate. In fact, we find here a criminal trial at its best.

Is it possible to convict a good-looking woman for killing her husband? This question, of course, is absurd, and as this is being written, a woman in Chicago has just been sentenced to death for this offense, although the newspaper explanation of this unusual occurrence was that she not only boasted of her "immunity" but was fatally unattractive, physically. Mrs. Kinney, however, was not forced to place her faith in her jury appeal as the case against her was certainly most unconvincing. There was no evidence that she had and used arsenic, and her husband had recently been treated by a quack who probably did administer arsenic to his patient in some of his fearful dosages. The evidence is a splendid commentary upon the dangers—to patients—from the medical practitioners of one hundred years ago.

Dr. D. H. Storer, called in to relieve deceased's suffering shortly before death, prescribed a poultice, 40 drops of laudanum to be taken, and also an injection of 60 drops of laudanum. The next day he prescribed a pill of calomel and opium. Both Dr. Storer and Dr. Bigelow, called in as a consultant, thought the patient had the cholera. Dr. Bachelder, originally employed to treat deceased for venereal disease,—so he said—gave him five or six cathartic pills and later a "bowel pill" of his own manufacture, composed of

mucilage and cayenne pepper! The defense put on the stand Dr. Reuben Harrington, a partner in the drug business, who declared that Bachelder mentioned "whether jestingly or not I cannot say, that he had killed one man. He said he had given him some of his bowel pills and the man died the next day. . . . He said he used powerful medicines which other doctors did not know how to use."

Also for the defense testified one Nathan Pratt:

"Have seen Dr. Bachelder's bowel pills. Was unwell at one time and called on him. He gave me six pills which he said were bowel pills. Took them home and took three at one time, which came near killing me."

After reading the "medical" testimony we are quite content that Mrs. Kinney, though thrice married and widowed, should be given her freedom. The chances are infinitely greater that the poisoning, if any, was done for a fee by the quack practitioner.

The trial of *Lieutenant James Renshaw* (p. 650) for unbecoming conduct before a Naval Court of Inquiry at New York, 1808, is of itself unimportant. The result, a "whitewash," could only be expected when the accused was allowed to direct questions publicly to his own officers and men. But out of this affair grew the circumstances resulting in the trial of Lieutenant James Renshaw (p. 659) for sending a challenge to a duel to the lawyer who opposed him in litigation growing out of his "unbecoming conduct." The latter retaliated by having him prosecuted under the New York statutes against duelling.

This statute is of considerable interest since it attempted to solve this social problem by prescribing two different penalties—one for New Yorkers, dis-

franchisement and disqualification for twenty years, and another for outsiders, a fine up to five hundred dollars *and* imprisonment up to seven years. Since Renshaw was a Naval officer, serving in and around New York City, but was a Pennsylvanian, it was quite a problem to know how to apply the statute in case he was found guilty.

But, as might be expected, he was acquitted. We have seen before in the trials of *Booth* and *Hooper* (Vol. 3, pp. 370, 377) that statutes are ineffective in the face of public opinion. Duelling did not die out because of legislative proscriptions but because of a change in public opinion, generally sweeping the country in the middle of the past century.

Several interesting points are made in this trial. First, is the unusual spectacle of a lawyer, with litigation pending, causing to be printed an attack upon the party defending against him, and thus creating a sentiment for "ample damages." And, when called to account, the lame excuse was made for making no apology that "it might prejudice the cause of his client." Another interesting sidelight was the general feeling, appearing between the lines of the testimony, of dissatisfaction by the people with the "present embargo and gun-boat policy of our administration." In fact, the defense claimed that the whole affair was cooked up to reprobate the gun-boat policy of national defense. This was in 1808 when the complex causes of the so-called War of 1812 were slowly developing.

Was a challenge ever sent by the Lieutenant? Knowing the *Code of Duelling*, and realizing that duelling was practiced in the United States Navy (as witnessed by the duel at Bladensburg, 1820, between Commodores Barron and Decatur, seconded by Com-

modores Elliott and Bainbridge), suppose you received a letter from a young, hot-headed Naval officer requiring an apology "equal to your wanton, offensive aspersion of my reputation," then a follow-up letter appointing a friend with "ample authority to act in such manner as may appear to him most conducive to my honor and feelings" and, after you ignored these missives, you found that you had been *published* as "an infamous, evasive coward, and a malignant scoundrel"—then, we imagine you would agree that you *had been challenged to a duel*. But, the jury, representing the spirit of the times, thought otherwise.

What can we say for *Henry C. Green* (p. 705), tried for the murder of his young wife, whom he had married only a few days before he caused her death? His only defense was a character defense and that was not as good as it should have been. He had had trouble in his church over drunkenness and it was widely rumored that he was guilty of burning his own store to collect insurance. He could not even take refuge in the insanity defense although there was a vague reference to "fits" which he suffered several years before. Why should he poison his wife? Was it a case of "too much family"? His mother and sister had considered the bride an unsuitable person to be his wife and they had a long interview with him before she became ill.

The inhuman wretch evidently gave her poison time and again, standing by in the guise of nurse to his young wife. Finally, she realized that the potions he gave her were causing her death and the attending physician testified:

"On Sunday heard deceased say to prisoner: 'Henry, have I ever deceived you in any way?'"

He answered, 'No.' She said: 'Have I ever said or done anything you disliked?' And he answered, 'No.' She then said, 'Oh, Henry' and nothing more."

Told that she could not live until morning she said to her brother, "Must I die and not see my mother?"

Of chief interest in this sordid affair was the charge of Judge Amasa J. Parker, who declared that:

"This is a case certainly of most extraordinary character. In examining the cases of capital crimes recorded in the books, there is nothing to be found precisely of this character; nor is there anything like it in the experience of any connected with the courts. A young man just entering on life—scarcely twenty-two years of age—connected with some of the most respectable families in the county—stands indicted not only for the highest crime known to our laws, but for the murder of his wife; and that too, of a wife to whom he had been married but a very few days."

Judge Parker made a minute examination of the evidence in the case, but in a calm, fair, and just manner, and gave the case to the jury with the following exhortation:

"A high and solemn duty devolves upon you. I have no doubt you will meet it as becomes yourselves, though it be the most painful act of your lives. Probably this is the first time that you have been called upon to pass upon an issue so momentous; and I trust it may be the last. You are to soar above all extraneous influences, political and local—to discard everything foreign to the case before you. You are above it and beyond it. You have a high and holy duty to perform. You are to mete out justice with a firm and impartial hand; and under every obli-

gation to your country, to your own consciences, and to God, to discharge your whole duty, without fear or favor. You have been told of the consequences of a wrong verdict in this case. You have nothing to do with conjectures and possibilities. You are to say, on your consciences and your oaths, whether upon the evidence before you, the prisoner is guilty. If you discharge that faithfully, whatever may be the true state of the case, you can have hereafter no cause for regret. You will always be sustained by the reflection that you have faithfully discharged your duty according to the lights before you at the time; and whether you acquit the guilty or convict the innocent, your consciences will tell you that you acted from an honest and firm purpose to discharge your whole duty."

But after the verdict had been received Judge Parker, perhaps to impress the spectators or, perhaps, to relieve his own congested breast, leaped forth to sear the unhappy man with an eloquent fire of righteous indignation. These words undoubtedly made a profound impression upon the spellbound listeners.

"An intelligent and honest jury have found you guilty, and it is not to be denied that there is no individual who has heard this trial that does not concur fully in the righteousness of that verdict. You stand condemned as guilty of having murdered your wife. Your case in all its aspects, exceeds in enormity any of which I have ever heard. It will no doubt stand out on the page of history the most criminal, awful case of murder that ever came before a court and jury.

"You murdered her deliberately. You murdered the woman whom you had sworn but one short week, I may say but four days before, to cherish through life. The woman whose destiny

had been placed in your keeping, in less than one week after marriage, you deliberately poisoned. You pursued your design, day and night—repeating the deadly potion from time to time until she expired—and thus added to the crime of murder, the black crime of perjury; for you violated the most solemn vow, taken at the altar.

“Was it ever known that so interesting and holy a relation as that of man and wife has been followed thus soon by a result so shocking and sinful to all the feelings of our nature? Now, the law pronounces your sentence. You are to be executed; cut off in the prime of life, or rather just as you are entering on life; where you had rich and powerful friends to aid you; when you might have been respected; but from which you are to be cut off and consigned to an early grave. And those friends who have stood by you, will not share in the disgrace that awaits you. They have been disgraced more by your foul deed than by the ignominious execution which the law has provided for you.”

Considering this impassioned condemnation *after the verdict*, the reading of the charge, moderate and fair, will impress the reader with the realization that even-handed justice presided at the trial.

NEWMAN F. BAKER,

Northwestern University Law School.

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THE TRIAL OF HARRY E. WOOTTON FOR KIDNAPING, TOMBSTONE, ARIZONA, 1920.

THE NARRATIVE.

Shortly after the United States had declared war against Germany, strikes in the copper mining districts of Montana and Arizona were ordered by the Industrial Workers of the World. On June 6, 1917, demands were made on each of the extensive copper mining companies of the Warren District of Arizona, which includes the town of Bisbee and whose mines were producing one-tenth of the output of copper in the world, and whose employees numbered nearly five thousand men. The miners were earning high wages and the object of the demands which gave the companies only a few hours in which to reply, was not only as proclaimed by their leaders to oust the owners from the control of their properties but to embarrass and defeat the United States in its war against Germany. The companies refused the impossible conditions, whereupon the strike was called by the I. W. W. organization. Picket lines were established at the approaches to every mine shaft in the district. Men who refused to join the strike were forced to pass through crowds of strikers, the majority of them of foreign extraction and strangers who had come into Bisbee in large numbers during the past days, to get to and from the mines. Men were either forced to quit work or threatened with death if the strikers won. Meetings were held every day in the city park at which I. W. W. speakers told the strikers to stand fast and assured them that the strike was certain to succeed.

At the end of a week, however, the situation began to change. The boast of the I. W. W. that they would force the mines to close unless their demands were granted had

fallen flat. The mines were still operating. The I. W. W. had attempted to get the pump men to leave their posts and the pump men had refused, a resistance they had not looked for. With these remaining at their posts there was no possibility of the mines being flooded and this disarmed the strikers of one of the biggest clubs which they hoped to hold over the heads of the district.

Speakers at the I. W. W. meetings now adopted different tactics. Where they had at first been confident they now became desperate. Their promises and pleadings became more lurid. If the miners would all quit until the present strike was won, said the speakers, another strike for \$8.00 a day and six hours work would be called; following this a third strike would be called for \$10.00 a day and four hours work and then the workers could refuse to stand by any wage agreement until the mine owners, unable to operate their properties with any profit, would be forced to turn them over to the workers themselves. And the speakers turned their verbal venom on the war and denounced it as a "Wall Street War"; they denounced the Liberty Loan and declared that the red card of the I. W. W. was "the best Liberty bond you can buy."

Complaints of violence and threats began to come from every part of the district. Miners who continued to work were attacked by I. W. W. pickets, their lunch buckets were thrown away and in many cases they were met by gangs of strikers and badly beaten, wives of miners received threats that their houses would be dynamited or burned, men going to work were told by pickets that their wives and children would be outraged and then murdered; the American flag was frequently termed "a dirty rag" and the American government insulted in the vilest of terms. Often boasts were made as to the quantity of dynamite and fire-arms they had in hiding which they would use in burning the town and massacring the inhabitants. No attempt was made by the I. W. W. and their sympathizers to conceal that the strike was a direct blow at the government of the United States, the draft law and the war.

On July 11 the mayor of Bisbee informed one of the strike leaders (Embree) that the strikers were forbidden to use the park for meetings without a permit and called attention to city ordinances forbidding troublesome congregations on the streets. Embree replied that he and the strikers were tired of "being deprived of our rights," that he would no longer be responsible for the conduct of the I. W. W. strikers as he could "no longer control them." "If you can't control them I can," replied Sheriff Wheeler, who during these days had deputized hundreds of miners and citizens and organized provisional companies of these deputies. Immediately after Embree's declaration he called them together, stated the conditions existing and that he had asked the governor of the state and the Federal government for protection, but without result and gave his opinion that the I. W. W. and their following were getting so desperate that bloodshed and the wholesale destruction of property appeared imminent and that drastic action was necessary to prevent such a catastrophe.

Plans for the roundup and deportation of the trouble-makers were gone over in detail by Wheeler and his captains. Throughout the night the work of disseminating orders to the hundreds of deputies in the Warren district was carried on. The newspapers contained a proclamation signed by the sheriff directing all women and children to remain off the streets and announcing his intention to bring the I. W. W. trouble at Bisbee to an end. At about six o'clock in the morning of July 12 he and his deputies started rounding up the men. A large number were arrested while doing picket duty on the I. W. W. lines. Others were taken at the I. W. W. head-quarters and all of them surrounded by deputies were marched to the baseball park where they were individually questioned. Married men, men with property in the district and men who were willing to abide by the laws of the community and cease attempting to stir up strife were released. About noon the remainder, numbering 1175 and including practically every member of the I. W. W. in the district, were put on a special train

that had been made up for the occasion, taken to Columbus, N. M., and placed there in a United States internment camp. After being watched and questioned closely for more than a week they were given permission by the Federal officers to leave. Many of them however remained at Columbus for several weeks on account of the free food and quarters provided there. Others returned to the Warren District. Many of these on announcing their willingness to refrain from trying to create trouble were given employment in the mines. At least a score of the deported men were afterwards deported by the Federal government as dangerous anarchists.

For several weeks after the deportation the Warren District was closely guarded by deputy sheriffs in order to prevent some of the deportees from carrying out their threats that they would return to Bisbee and carry out a reign of terror. The deportation however had completely broken up the I. W. W. menace in the Warren District. And within a few days after the deportation the I. W. W. strikes in other Arizona camps were at an end.

But the citizens of Bisbee had violated the statute law and technically they were guilty of kidnaping. And the state of Arizona to vindicate its majesty, haled over 200 of them into Court to answer for their acts. From them one Wootton was selected and in March, 1920, was brought to trial.

His counsel recognizing that the state statute against kidnaping had been violated, that while the sheriff and the citizens as his deputies had a right to arrest the strikers, they had no right to forcibly deport them from the state, but should, if legal rules were followed, at once have turned them over to the authorities of the law for trial and conviction, if found guilty of any crime. They therefore set up the very frequent and popular defense of Self-Defense and the rare and little known one of Necessity. The judge ruled that self-defense was not a good answer to the charge against the defendant, but that if it could be shown that at the time of the deportation a real, threatened and actual

danger of immediate destruction of life and property existed, or that it so appeared to sensible minds and that the defendant and his associates honestly acted in this belief, the doctrine of necessity applied and his and their acts were in law excused.

To prove the danger to the community the defense read in evidence letters and speeches of I. W. W. heads; the constitution of the organization and numerous books, pamphlets and other literature issued from its press. These showed that the objects of the Industrial Workers of the World are to destroy capitalism and to abolish the wage system; to put the working class in control of all industries by taking away by force their factories from the owners—the question of right and wrong not concerning them at all; to “take possession of the earth and the machinery of production, thus putting an end forever to the rule of the robber class.”

The next war they say will be that in which the workers of all lands shall be united against the rich “who have seized the land and lived on the labor of the poor”. They advise the worker to employ sabotage which they define as the destruction of raw materials in a factory or of machinery, the spoiling of a finished product, working slowly, doing poor work, missending goods and the telling of trade secrets—a direct application of the idea that property has no right that its creators are bound to respect—“the question not being, is sabotage immoral, but does it get the goods?”

And every worker must work for the time “when he will live at ease and hear the whistle blow for the bosses to go to work.”

After listening to evidence of this character as well as testimony from scores of witnesses as to the condition of terror in Bisbee for many days and the brilliant arguments of the counsel for the defendant, the jury in less than an hour, satisfied that the people of Bisbee on the morning of July, 12, 1917, believed they were in danger, returned a verdict of not guilty.

THE TRIAL.¹

In the Superior Court of Cochise County, Tombstone, Arizona, April, 1920.

HON. SAMUEL L. PATTEE,² *Judge.*

March 10.

In January, 1920, over 200 citizens of Bisbee and Cochise County were arraigned, charged with the forcible deportation from the County and State of a large number of miners and workmen, members of the Industrial Workers of the World and others, in July, 1917.

They pleaded *not guilty*.

The State selected for the first trial Harry E. Wootton. The indictment charged that he did forcibly take, arrest, and convey into the State of New Mexico, without right under State or Federal laws, one Fred W. Brown, in violation of section 185 of the Penal Code of Arizona which is as follows:

"Every person who forcibly steals, takes or arrests any person in this State and carries him into another country, State or county, or into another part of the same county, or who forcibly arrests or takes any person with a design to take him out of this State, without having established a claim according to the laws of the United States or of this State, * * * is guilty of kidnapping."

¹ *Bibliography.* The Typewritten Record in the case of State v. H. E. Wootton, as prepared by the official reporters with all the testimony, proceedings, arguments and rulings in the Case.

The *Bisbee Daily Review*, March-April, 1920.

* The Law of Necessity as applied in State of Arizona v. H. E. Wootton, Bisbee I. W. W. Deportation Case. Statement of Case and Offer of Proof by Frank E. Curley, of Tucson, Arizona. Argument on the Law of Necessity by William H. Burges, El Paso, Texas. Opinion of Judge Samuel L. Pattee. Instruction to Jury by Judge Pattee. Verdict. Statement of Jurors. Published by Bureau of Information.

* Star Job Print, Tuscon, Ariz., 1921."

² PATTEE, SAMUEL LEROY. Born Chicopee Falls, Mass. 1869. Educated in the public schools of New Hampshire and studied law there.

On February 2, the empaneling of jurors began but was not completed until March 10, when the following persons were selected and sworn: J. O. Calhoun, Douglass (Foreman); Lee Holland, Apache; Andrew Mortenson, Douglass; John A. Jones, Sunnyside; Henry Richards, Hereford; W. L. Patterson, Benson; Amos Gretton, Douglass; Frank E. Brown, Willcox; Byron K. Riggs, El Dorado; Jesse E. Amelong, El Dorado; Clifford R. Weese, Servoss; Jesse N. Curtis, Happy Camp Canyon.

" The trial began today.

*Robert N. French*³, County attorney; *George Roark* and *A. A. Worsley*⁴ for the State.

*William Burges*⁵, *Frank E. Curley*⁶ and *William G. Gilmore*⁷ for the Defendant.

Removed to Minnesota and admitted to bar, 1891. Removed to Arizona 1899. Dist. Atty. Yavapai Co. 1902. Asst. U. S. Atty. 1914-1916. State Code Commissioner. Judge Sup. Court, Pima Co. 1917.

³ FRENCH, ROBERT NAPOLEON. Born Norton, Wise Co., Va. 1861. Educated Tazewell Coll. Grad. Univ. of Va. 1881. Admitted to Va. bar, 1882. Commonwealth Atty. Bland Co. Removed to Arizona, 1901. County Atty. 1917.

⁴ WORSLEY, ALBINUS A. Born Racine, Wis. 1868. Educated at Valparaiso, Ind. and admitted to bar 1900. Practiced law in Chicago and Nebraska and removed to Arizona 1903. State Senator Ariz.

⁵ BURGESS, WILLIAM HENRY. Born Seguin, Guadalupe Co., Tex. 1867. Educated in the public and private schools Seguin and grad. Un. Tex. (B. L.) 1889. Practiced law El Paso, Texas, 1889-1917. 1917-1918 practiced law in Chicago as a member of the firm of Gregory (S. S. Gregory sometime pres. Am. Bar Assn.), Burges and McNab, returning to El Paso 1918 to become chief counsel in the Bisbee deportation cases and to resume his place in the firm of Turney, Burges, Culwell, Holliday & Pollard. City Atty. El Paso 1893-1895. Member of the board regents Univer. of Texas.

⁶ CURLEY, FRANK E. Born Walton, Ky. 1877. Grad. Cincinnati Coll. 1897. Admitted to bar 1897 and practiced in Kentucky. Removed to Arizona, 1906.

⁷ GILMORE, WILLIAM GRANT. Born St. Mary's, Ohio, 1866. Grad. Ohio, Northern Univ. (M. S. LL. B.) 1893. Admitted to bar, Ohio, 1893; California, 1901; Arizona, 1905. Removed to Arizona 1905. City Atty. Tombstone 1908-1912. County Atty. Cochise Co. 1912-1914. City Treasurer, Tombstone, 1915-1919.

THE WITNESSES FOR THE PROSECUTION.

March 10.

Fred W. Brown: I live in Warren District. Know Harry Wootton. On July 12, 1917, he forced me in line at the end of a gun. There were about 50 men with guns surrounding me. Then they took me to Warren Park and loaded us in box cars and sent us to Columbus, N. M. It was about noon when we were put in the cars and we reached Columbus about ten that night. The men that marched us to the cars all had white handkerchiefs on their arms. Ten or twelve of the guard went with us in the cars—all armed. From Columbus they took us to Hermanes, N. M., where we stopped until the morning of the 14th. Was not shown any legal mandate at any time. I returned to Bisbee on Sept. 21.

When I was brought before Mr. Wootton I asked him what the trouble was and he said, "You came up to my place a week ago and declared it unfair," and I told him that I hadn't declared it unfair. He says, "It doesn't make any difference. You set in line" and pointed the gun at me and forced me in line.

Why did I stay in that line and permit myself to be marched to the park and sent out of the state on the train? I was afraid that I would be either shot or hit if I tried to get away.

Cross-examined: I first came to Bisbee July 6, 1916. Mr. Wootton was then and still is in the business of selling

plumbing supplies. I testified last summer that it was Charles Baer who arrested me and put me in the line but that was not true. I first worked in a cigar store, started to work a few days after I arrived in Bisbee and about the middle of February I quit the store and went to work on a newspaper, *The Daily Square Deal*.

When I came down to the post-office I saw the circle of men with guns, and when I came out I kept watching them. As I walked down the street, I still saw the men. Ambrose Swock came from where Wootton stood. When he got within ten feet he hollered at me and I stopped and he asked me if my name was Brown and I said, "yes, sir" and he says "come with me" and he took me right up to Mr. Wootton. When we got over there he says, "Is this the man?" and Wootton says, "yes, that is the man." I asked him what the trouble was and he told me and forced me in line. So I considered he was the one that arrested me.

A majority of the working men I knew that were in the line of the deportees and the men whom I noticed on the outside with handkerchiefs on their arms and guns were business men I knew. I elected to stay with the people that had been my friends and people that I knew.

Freeman Crouch: I live in Bisbee; on July 12, when I first saw Harry Wootton and Fred Brown in front of the post-office I noticed Wootton

brought him to the ring and put him in the ring. I was in the ring at the time.

Some one spoke up and said, "Brown, what are you doing in here? You have no business in here." And Wootton walked out into the ring a little ways and says, "I don't see why he hasn't, he said my place was unfair."

We was taken to Columbus that night, and was there a short while and then they brought us to Hermanes and run us out on the sidetrack and left us there. There were about 1200 of us I guess. The train stopped several times but I was not going to try to break away with those fellows up there with guns; they gave us orders to stay in the cars. I worked in the mines; we went on strike on June 27.

H. L. Grenard: On July 12, 1917, I saw the defendant along the line that they were driving. I didn't know what they were doing at the time, the line was being marched off down towards Warren. He was armed. Most of them had a white handkerchief, or a white rag or something tied on their arms. There was an awful big bunch of them altogether. There seemed to be half and half or a little more armed men than

there were those that weren't armed.

Thomas Green: On July 12, I and Oscar Green were near the post-office when a man approached me with a gun and with a handkerchief tied around his arm. He says, "you will have to go with me." And I asked him where. He said, "we are going to send you sons-of-*** out of here today." I said, "I don't know just exactly what you mean." "Well," he says, "you go with me and you will find out." He takes me down in front of the Copper Queen store and he turned me over to another crowd that had guns and had handkerchiefs tied around their arms, and they kept us there about ten minutes, and they turned us over to another crowd, and they loaded us on a street car, and from the street car they takes us down to the Warren park, and at the depot there they stopped. They loaded us in box cars and took us to Columbus.

I was working on the Lowell shift. I quit the day before. I was going down to join the army when I was arrested. I afterwards enlisted and served in France.

Mr. Curley: Were you a member of the I. W. W.?

Objected to by the *State*.

Mr. Curley: The question is asked for the sole purpose of allowing the jury to determine what credit is to be given to the witness. The authorities all state that the character of a witness is relevant for this purpose. One of the principles of this organization is that right and wrong does not concern them. It is so stated by Vincent St. John in his book on the History of the I. W. W.

Their literature, their papers, show that the Christian religion to them is but a joke, that they scorn it. And will any man seriously contend that we are to sit by and watch the attempt upon the part of a witness to swear away the liberty of another man

when he holds up his hand to the Divine Being and it doesn't mean anything to him?

In a paper known as "The New Solidarity," published by the I. W. W. in Chicago, the following appears:

"Mammon's First Cousin." The Christian religion, through intrigue and oftentimes wilful misrepresentation by over-zealous, fanatical followers, so little resembles the teachings of the lowly Nazarene, its reputed founder, that instead of being a boon and blessing as originally intended, it has become a curse, stunting the intellect of the great uneducated masses, leaving them hopelessly enmeshed in a maze of superstition and hallucination. The modern priesthood and ministry are followers of Mammon and ever willing to prostitute the truth to further their false teachings.

Out of the world chaos the only beacon light is industrial organization through which the hungry masses, learning a love of truth, are becoming skeptical as to the story of the origin of their being as taught by the churches, much to the dismay of the parasitic clergy who have waxed fat at the expense of their dupes. Aye, fellow workers, our foremost enemy of course is the capitalist, but never forget that modern religion is a first cousin of Mammonism."

So in an editorial in their paper called the Industrial World we find this in an editorial: "A Roman Catholic Organization known as the Militia of Christ has lately sprung into prominence. Its avowed object is to fight Socialism. The scheme is ruled by the great international whore—the Roman Catholic Church."

Is a man who adheres to those doctrines to receive at the hands of a jury the same credit that an ordinary man receives?

THE COURT: Has this court held as a matter of law that its members are unfit for citizenship?

Mr. French: It has. But the I. W. W. is not an issue here. It is no excuse for what the defendant here is charged with doing.

THE COURT: My difficulty is that it has been held by a high tribunal that the court judicially knows nothing about this organization. Should it be shown by evidence that what counsel has just alleged is the character of the organization then I should certainly permit the question to be asked. But not now.

Mr. Burges: There was a strike, Mr. Green, called in the Warren District in June 1917, was there not?

Mr. French: We object. If there was any ground for the claim just made by counsel, I would dismiss every one of these cases. But Captain Wheeler's testimony before the Government Commission sent here as well as on the trial of Embree for riot, has not justified a scintilla of the facts as recited by counsel in this case. That commission took evidence, that was sent by the government to inquire into conditions there. They took evidence not of I. W. W.'s, not of these strikers and not of anyone else except business men, and the officers of that town. That committee's report states that that deportation was illegal under the laws of the United States and of Arizona, that there was no condition there that justified any such course. That commission was headed by a member of Presi-

dent Wilson's Cabinet, William B. Wilson. That report contradicts on its face every single assertion that was made in this case so far as conditions at Bisbee were concerned. It shows that more than a third of the men deported were married men who left families, that more than a third of them owned their homes, that more than a third of them owned Liberty Bonds, that a great many, several hundred of them, had registered for draft at the time and were prevented by the defendant and others, by that deportation, from joining the army, and they had to go to other points in which to join the army.

THE COURT: The rule in this State has never been the English rule which puts the witness on cross-examination about every thing that is material even though he has not been asked about it on his direct examination. The rule exists here and is strictly adhered to, that the witness may only be examined respecting those matters upon which counsel-in-chief examined him. The question here is purely defensive. I am not ruling as to its subsequent admissibility as matter of defense, but I sustain the objection solely on the ground that it is not proper cross-examination.

THE DEFENSE.

Mr. Curley: We expect to prove that in or about the year 1908, a conspiracy was entered into in the United States at that time between William D. Haywood, a man by the name of Vincent St. John and a great many other, running probably into the thousands, but the names of whom are unknown to defendant, by which and by reason of which they conspired feloniously together to overthrow the government of the United States; that it was to defeat the government in the enforcement of its laws and to ultimately do away with it, and to ultimately end and do away with the private ownership of property, and all by force. That it was not the purpose of said conspirators to acquire or deprive the owners of property of their said property by or through any legal or lawful methods or to change the form and structure of the government by or through any legal or lawful methods, but, upon the contrary, it was the purpose of said conspirators to so acquire and to deprive the then and now owners of all private property of their said property and to overthrow and destroy the then and present government and form of government of the United States of America, by force.

We expect to show that in the furtherance of the objects of that conspiracy, those then engaged in it, proceeded to apply the axe at the very roots of civilization in an effort to rob those who could not be reached by an insidious propaganda, of the benefits of a religion, rendering them less immune to the virus of anti-patriotism and anti-government. That since the creation of said conspiracy, the said conspirators and those who have since joined such conspiracy, and in furtherance of the objects thereof, have, at all times, continuously, down to the present day, consistently and persistently disseminated

a propaganda of misrepresentation and falsehood by means of newspapers, circulars, pamphlets, speeches, correspondence and the like, and calculated to, and which did, in the minds of many, create dissatisfaction with and aversion toward all organized government as an institution and the government of the United States in particular and toward those who support the said government and believe in the private ownership of property and possess property in private ownership.

That some of the methods advocated and employed by said conspirators in the furtherance of the objects of said conspiracy in order to force, intimidate and coerce those into submission who could not be reached through other propaganda, consisted of the continual and persistent use and employment of unlawful, tortuous and forcible means and methods involving threats, assaults, injuries and intimidation and murders upon the persons and injury and destruction of the property of others.

We expect to show that from the time of the creation of said conspiracy down to the 12th day of July, 1917, the said conspirators had, throughout the United States and more particularly in the western states and in the furtherance of the objects of said conspiracy, destroyed private property with a value running into the millions of dollars, and had destroyed many lives.

We expect to show that said conspiracy, from the time of its creation, had grown until its membership and those engaged in the furtherance of the objects of such conspiracy, exceeded on the 12th day of July, 1917, two hundred thousand members.

That in furtherance of the objects of said conspiracy, the said conspirators had, prior to the said 12th day of July, 1917, inaugurated a series of industrial strikes throughout the United States, and especially in the lumber and copper mining districts of the United States, well knowing, as they did during said period well know and intend, that the necessary effect of their so doing would be, as it in fact was, to hinder and delay and in part to prevent the execution of the laws of the United States, and to obstruct and prevent the prosecution by the United States of its war against the Imperial German Government, through interference with the production and manufacture of required articles, namely: munitions, ships, fuel, subsistence supplies, clothing, shelter and equipment required and necessary for the military and naval forces of the United States in carrying on its said war. That one of the purposes of said conspirators in inaugurating and carrying on this series of strikes that I have mentioned, was to discourage and obstruct the prosecution by the United States of the war then existing between the United States and Germany, and to, and which did, prevent, hinder and delay the enforcement of the laws of the United States enacted to authorize the President to increase temporarily the military establishment of the United States by diminishing the production of copper, lumber and food supplies, and thereby interfering with the production and manufacture of munitions,

ships, supplies and equipment required and necessary for the military and naval forces of the United States, and unless and until the United States should suspend or abandon the operation and enforcement of its laws providing for registration, selection and drafting of persons available for military service, and unless and until persons then in custody of the United States for violation of said registration, selection and draft laws be released.

In other words, we expect to show that the demands made upon the copper companies of the Warren District in June, 1917, and just prior to the calling of the strike in said district by the Industrial Workers of the World, commonly known as "I. W. W.," on or about the 26th day of June, 1917, were not made with the idea or purpose of securing increased wages or better working conditions, but that they were pure and unadulterated bunk concocted and put forward by a lot of disloyal, un-American anarchists, who were members of said conspiracy, as a screen behind which to hide their efforts and activities in bringing about the defeat of the United States in its war against Germany and the ultimate overthrow of the United States Government.

We expect to show that what, in July, 1917, and for many years prior thereto, was generally known throughout the State of Arizona and the Southwest generally, as the Warren District in this county, and during all of such period of time, was a copper mining district within which is, and at such times was, situated the City of Bisbee, the towns of Warren, Lowell and Don Luis, and the mines, mining claims and properties, mills and works of the Calumet & Arizona Mining Company, Copper Queen Consolidated Mining Company, the Phelps Dodge Corporation, Shattuck-Arizona Copper Company, the Denn-Arizona Copper Company and many smaller companies. That the population of said Warren District on said July 12, 1917, was in excess of twenty-five thousand people; that the assessed value of the property for the purpose of taxation within that district for the year 1917 was in excess of one hundred million dollars. That substantially, the entire population of said Warren District was on said July 12th, 1917, and in fact has always been, either connected with or dependent upon the copper industry of said district and upon the continued operation and production of the said industry for their support and maintenance; that during the year next preceding July 12, 1917, more than one hundred and seventy-five million pounds of copper or more than one-tenth of all the copper produced throughout the world during that period, had been produced from the said Warren District, and that a daily average of more than forty-five hundred men had been engaged in such production.

We expect to show that on or about June 26, 1917, one of these series of I. W. W. anti-conscription, anti-war and anti-government strikes was called by said conspirators in the Warren District and was being carried on by them on the 12th day of July, 1917, and at the time of the alleged kidnaping complained of in the information filed herein. As I stated before, we expect to show that the so-called

Bisbee strike was not called for the purpose of securing better working conditions or higher wages, but was called for the sole purpose of embarrassing and defeating the United States Government in the prosecution of its war against Germany, and as one of its steps in the destruction of the private ownership of property, and that such purposes were admitted by those responsible for and in charge of such strike. We expect to show that the strike in Bisbee was but one of a well planned series of strikes called and then being carried on by said conspirators throughout the United States in an effort to accomplish such purpose.

We expect to show that in the furtherance of the objects of said conspiracy, the said conspirators were, upon the said 12th day of July, 1917, and at the time of the alleged kidnaping complained of in the information herein, gathering in the said Warren District in great numbers and had, just prior to said 12th day of July, 1917, gathered in said Warren District in great numbers, claimed by said conspirators to be in excess of three thousand, for the purpose of destroying the lives and property of persons within said Warren District, including defendant and defendant's wife and children.

We expect to show that in furtherance of the objects of said conspiracy, the said conspirators had, just prior to said 12th day of July, 1917, assaulted and, from time to time, were continuing to assault many persons in said Warren District other than said conspirators, and that, prior to said 12th day of July, 1917, had stored and hid out, within said Warren District, large quantities of dynamite and other high explosives for the purpose of destroying the lives and property of persons then within said Warren District other than said conspirators and had threatened to so destroy, and it was the then avowed purpose of said conspirators to so destroy the lives and property of such persons within said Warren District other than said conspirators, upon or immediately following said 12th day of July, 1917.

We expect to show that on the evening of July 11, 1917, A. S. Embree, one of the said conspirators and one of the recognized leaders of all of said conspirators and a member of the executive committee in charge of the strike then being so carried on by said conspirators and a man high in the councils and activities of the I. W. W. organization, notified Captain Harry C. Wheeler, then the duly elected, qualified and acting sheriff of Cochise County, and then charged with the duty of protecting the lives and property of the people then within the said Warren District, that he, Embree, would no longer be responsible for the acts and conduct of his men, referring to the others of said conspirators, or words of like import.

We expect to show that said conspirators, just prior to said 12th day of July, 1917, stated that they had large quantities of firearms and ammunition hid out within the Warren District for the purpose of destroying the lives of persons other than said conspirators in said Warren District.

We expect to show that on the said 12th day of July, 1917, and at the time of the alleged kidnaping as in said information complained of, there was then a reasonable ground on the part of Sheriff Wheeler and those then acting with him, including defendant, to apprehend a design on the part of such conspirators to commit many felonies, namely, a riot as defined by the laws of Arizona, treason as defined by the laws of Arizona, a conspiracy to commit a felony as defined by the laws of Arizona, and a conspiracy to curtail and advocate the curtailment of production in this country of things and products necessary and essential to the prosecution of the war then engaged in between the United States and the Imperial German Government, as defined by the laws of the United States, and to do great bodily harm and to destroy the lives and property of persons then within said Warren District other than said conspirators, including defendant and his wife and children. That on said 12th day of July, 1917, there was imminent danger of such design being accomplished.

We expect to show that the threats and conditions heretofore referred to were, just prior to the 12th day of July, 1917, conveyed to Sheriff Wheeler and to those acting with him on the 12th day of July, 1917, including defendant, and at the time of the alleged kidnaping as set out in the information herein by persons in whom he and they had confidence and believed, and that such information was of a character that any reasonably prudent man or set of men was and were justified in believing and acting upon; that acting upon such knowledge and belief then had, Sheriff Wheeler did, just prior to the said 12th day of July, 1917, wire the then Governor of the State of Arizona that he anticipated great property loss and bloodshed and did request the Governor to use his influence to have United States troops sent into the Warren District to take charge of the situation and prevent bloodshed, the said Sheriff then knowing that there were no state troops then available or subject to the orders of the Governor; that the Sheriff also wired those in charge of and empowered with the direction of Federal troops on behalf of the United States Government a similar request, but that on the said 12th day of July, 1917, and at the time of the alleged kidnapping as complained of in the information herein, no troops had been sent into the said Warren District to protect the lives and property of persons then within said district from death and injury then imminent and being threatened by said conspirators.

We expect to show that the accomplishment of the objects and purposes of such conspiracy by said conspirators would not only have resulted in the loss of life and property in the Warren District, but would, as Sheriff Wheeler believed and those acting with him on the 12th day of July, 1917, including defendant, believed at the time of the alleged kidnaping as set out and complained of in the information herein, and as reasonably prudent persons were justified in believing, have resulted in the ultimate defeat of

the United States Government and its Allies in their war then being carried on against the Imperial German Government.

We expect to show that the jails in this county were inadequate within which to confine the said conspirators or any great number thereof, and that there were no jails within Cochise County where said conspirators could have been so confined; that it was at that time the avowed purpose and policy of said conspirators to allow themselves to be arrested in sufficient numbers to fill the jails and thereby render it impossible to further confine other of said conspirators, and thereby rendering the officers helpless in attempted arrests and in preventing the committing of crimes, and with such information in mind and in view of the threats and avowed policies of said conspirators and their character, Sheriff Wheeler and those acting with him, including defendant, on the said 12th day of July, 1917, and at the time of the alleged kidnaping as set out and complained of in the complaint herein, believed, and as prudent persons were justified in believing that any attempt upon their part to arrest the said conspirators and confine them at any point within Cochise County, would result in greater numbers of said conspirators coming to their aid and in releasing them and would result in the loss of many lives and the ultimate carrying out of the objects and purposes of said conspiracy as heretofore set out.

We expect to show that from the threats made and conditions then existing in the said Warren District and the acts of the said conspirators in acquiring the said dynamite and other high explosives and firearms and ammunition as heretofore detailed, and in view of the fact that great numbers of said conspirators were then and upon the said 12th day of July, 1917, continuing to gather and assemble in the said district in greater numbers for the purpose of the accomplishment of the objects of said conspiracy, the said Sheriff and those acting with him on the said 12th day of July, 1917, and at the time of the alleged kidnaping as set out and complained of in the information herein, including the defendant, believed, and as reasonably prudent men were justified in believing, that immediate action was necessary in order to save the lives and property of the persons within the Warren District from destruction at the hands of said conspirators, that it was necessary that said conspirators be immediately removed from the said Warren District and delivered over to some organized authority sufficient in number and sufficiently equipped to not only detain the said conspirators and prevent their return into the said Warren District for the purpose of carrying out the objects of said conspiracy, but also to prevent other members of said conspiracy assembling in great numbers and releasing the said conspirators and enabling them to carry out the objects and purposes of said conspiracy. We expect to show that Sheriff Wheeler and those acting with him as before stated, then believed and were reasonably justified, as prudent men, in believing, that at the time of the alleged kidnaping as complained of and set out in the informa-

tion herein, there was no other way in which the lives and property of the persons within the said Warren District could be saved from destruction at the hands of said conspirators, unless it would be by destroying the lives of said conspirators, which, in turn, must necessarily have resulted in the destruction of many lives within said Warren District, other than of said conspirators.

We expect to show that Fred W. Brown, the prosecuting witness herein, and being the same Fred W. Brown named in the information herein, on the 12th day of July, 1917, and at the time of the alleged kidnaping as set out and complained of in the information herein, and continuously for a long time prior thereto, was one of said conspirators, and during said period was actively engaged with the other of said conspirators in the furtherance of and in acts carrying out and in endeavoring to accomplish the acts and purposes of said conspiracy.

We expect to show that with all of the matters and things in view that I have heretofore set out, and acting on the belief as heretofore set out, Sheriff Wheeler did, just prior to the alleged kidnaping complained of and set out in the information herein, call to his aid a *posse comitatus* consisting of more than one thousand of the male citizens of Cochise County, and including defendant, and that he did then lay before the members of such *posse comitatus*, including defendant, all of the information and knowledge then had by him with reference to such conspiracy and which was as heretofore detailed, and did then order the members of said *posse comitatus*, including defendant, to aid him in the arrest of said conspirators, and that they, including the defendant, in obedience to that command, did aid the Sheriff in the arrest of the conspirators, including Fred W. Brown. And that following this the conspirators were under the direction of the Sheriff removed from this District and delivered into the custody of the United States troops at Columbus, New Mexico. And that said Brown was not carried there against his will but accompanied his co-conspirators freely and voluntarily and of his own free will.

Mr. Burges: May it please the Court. It is not improper for me to say that at least in the judgment of counsel representing the defendant no more interesting or important case has ever called for the attention of the Court. Many months have been consumed in the preparation of this case for trial, no small portion of which time has been given to consideration of the law applicable to the case. We are of the opinion that the principles which should and must govern its determination are as old as our law and as enduring as human nature.

The defense is based upon two propositions, different and yet resembling each other as kinsmen—the right of self-defense and the law of necessity.

If it were only an ordinary case of self-defense, the kind of self-defense with which all courts and almost all citizens are familiar, in which one man defends himself from an attack made upon him

by another by force of arms little that is new could be said to this Court. We think the fact that many were involved in the transaction out of which this prosecution arises and out of which grow the numerous prosecutions that are pending against those who acted in what, for want of a better and more descriptive name, may be called the Bisbee Deportations of July, 1917, does not change the principles which govern the case. The right of one man to defend himself or those whom he is charged with the legal or moral duty of protecting is undeniable. The right is in no way abridged because two are jointly or severally attacked and jointly and severally defend themselves, nor three, nor four, nor five, nor any number, nor can the point be found at which the right of self-defense ceases simply because of the number of those whose rights are involved and whose rights call for defense. Nor is the right of self-defense in any way impaired by reason of the fact that those whose rights are invaded or threatened act together in defense of their rights.

It is our contention that the right of self-defense is a perfectly valid defense in behalf of a community as well as an individual. In other words the right of a community to save itself from an overwhelming, irreparable evil with which it is threatened, by the action or threatened action of man armed or unarmed, banded together against the peace and welfare of that community, in such numbers and under such conditions as to imperil the lives of the people in that community or the safety of their property, or of any great part of them is one form of self-defense, community self-defense, and is a right sound in law and in morals.

We are going to take, what we trust the Court will not think unnecessary time, in going back over the path that has led counsel for defense to the firm conviction that self-defense exists in any number as well as in one, and in a community, as such, as well as in any individual of that community. We shall read the authorities which establish the principle upon which our defense is firmly based.

Akin to the law of self-defense and yet differing from it, is the law of necessity, a law founded on reason and recognized by courts, a law almost incapable of definition, but, nevertheless an existing part of the law of this and every civilized country. One of the writers we shall call to the attention of the Court has stated that self-defense is the right of protecting one's self from the unlawful aggression of another, the right of protecting one's person or dependents or property from the unlawful invasion by another. The law of necessity is that law that justifies by virtue of necessity the invasion of another's right. Both exist and both have been applied many times. Both find their origin in the primal instinct of man to defend his life and what is his own, whether it be his family or his property; a law stronger than any other in the world; a law before which every thing else gives way when the occasion presents itself, excepting the supreme necessity that comes to a

man of sacrificing his own life for family or community or country.

In addition to this firm basis of fundamental instincts and impulses of the human heart upon which the law of self-defense is founded, the law of necessity is further buttressed by the maxim that the safety of the public is the supreme law, a maxim peculiarly applicable to the facts of this case as they will be manifested to Your Honor during the progress of the trial.

Believing that these two principles govern this case and that on these two principles must rest the ultimate decision of what is just in this case, we are of the opinion that we have the right to show all of the facts, circumstances and conditions that existed in the Warren District on the 12th day of July, 1917, and immediately prior thereto, out of which grew this great transaction.

It is our contention that the action then taken by this defendant and his associates was brought about by conditions which imperiled the property of many, the lives of many and even more than all of that, imperiled the capacity of the United States, then at war, to meet the obligation which it owed itself, its citizens and the world at large in the great undertaking upon which it had embarked. It is our contention that had the effort of those conspirators referred to by Mr. Curley in his opening statement been successful, the production of the large amount of copper which the Warren District was capable of producing would have been impossible, and that not only would the people living within the Warren District have thereby been deprived of that to which they were entitled and which was necessary to the maintenance of the lives of that district, but that the government itself would have been denied a prime necessity of the government at that hour.

I do not have to argue, of course, that when a man is attacked by another with a loaded gun and defends himself by taking the life of the aggressor, that he has a perfect right to show what was the condition at the time, his own condition and that of his assailant, whether he was physically able to meet his adversary and win a victory from him and save his own life without resorting to the taking of the life of the other, or whether it was necessary to take the life of the other in order to save his own. We should not even have to prove in such a case that it was actually necessary but only that it reasonably appeared to him to be so. We would be permitted, without question, to show previous threats or declarations of the purpose of the men against whose violence the defendant was protecting himself, communicated or uncommunicated. We would be permitted to show the character of the man making the threats, whether he was a man who would be liable to take the life of another under these conditions or not, as showing the necessity for the defendant to defend himself, or the apparent necessity thereof and his reasonable belief from all the facts and circumstances that the aggressor contemplated a murderous attack upon him. From this we have reached the conclusion that when a community, the law-abiding portion of the community, the peaceable

portion of the community, the productive portion of the community, has been made the subject of threats of violence; when these threats have been communicated to it or to its representatives, the chosen officers of that community charged with the duties of enforcing its laws and protecting the property and lives of the people, or those who while wanting in official capacity, are nevertheless their chosen leaders, when these conditions exist and these threats have been made and these threats have been communicated to them, we have the right to show that the persons who made these threats were in sufficient number to carry out the threats that had been made, or that they were of the character to justify the belief that they meant to carry out these threats; that the making of these threats and the consummation of the purpose indicated by the threats were parts of a well defined scheme and plan then being carried out in different portions of the country having a common, determined end. We say that when these facts have been established when it is shown that on one side of the controversy there are a large number of people living in their homes with their families, people engaged in the peaceable pursuits of life, in the peaceable production of something absolutely necessary to the very life of the country itself, and such persons are threatened by an organization of men sufficient in numbers to destroy the property and to take the lives against which their threats are directed; and to make impossible the production of that which was necessary to the lives of the threatened people and the preservation of their property and the very life and preservation of the government itself, we have the right to show that the persons making these threats have avowed their purpose to make impossible the production of that which the government needed; to make impossible or unsafe the continuance of the peaceable affairs of life and its employments and industries. We have the right to show that such conspirators were threatening the destruction of the property of these people, their homes and those things from which they drew the sources of support for themselves and their families, and the destruction of large numbers of the people themselves. We contend that we have the right to show these things insofar as they effect the safety and well being of the community, just as surely as we should have the right to show them were an individual only the subject of such threats and actions.

It is our contention that if an individual in the protection of his life, or in saving himself from what is apparently an effort to take his life, that if such a person has the right to take the life of another, then he has an equal right to do a lesser thing, for instance, temporarily incapacitating the assailant from carrying out his purpose. If a man attack me with a threat of taking my life and he has the apparent capacity and purpose to execute his threat, or it is reasonably apparent to me that such is his purpose, I have the right to shoot him as he stands. Can it be denied that I have the lesser right of knocking him down and making it impos-

sible for him to carry out his purpose? Can it be contended for one moment that if I have the right to take his life to keep him from taking mine, that I would not have the right to tie him so he could not do it? Or if I had the right in defense of myself to put him out of the world of living man, that I would not have the lesser right to put him out of the community that he lives in so that for the time being he could not do me that damage? If my life were in danger, but I could save it by temporarily imprisoning or deporting him, would I be justified in killing him instead? Certainly not. In that event it would be my duty to do him the lesser harm rather than the greater. If at the same time that my right was invaded, my life jeopardized, ten of my neighbors were similarly situated, would the right of any one be less because the lives of all were in danger? If, in the protection of my life I had the right to confine or to deport, or to kill my assailant, would my neighbors similarly situated have a less right than I, or I a less right than they; if it extends to ten, does it not extend to hundreds and thousands similarly situated? Can it be contended that, if as a matter of fact, A. S. Embree on the 12th day of July was undertaking to take the life of H. E. Wootton and was apparently capable of doing it and avowed his purpose to do it, and had committed an overt act in the execution of that purpose and Mr. Wootton had killed him to protect himself, that he would not have been fully justified under the law? Of course he would have been justified. To state the proposition as to that is to prove it. If, however, Mr. Wootton could have saved himself by knocking Embree down and tying him, would he not have been justified in tying him? It would have been his duty to have used all means, short of taking life, and only to have taken life when every other means had failed. If Wootton could have saved his life by knocking Embree down and tying him and having him temporarily taken without the state, would it not have been as clearly his right as it was to kill him and would it not have been his duty to do this instead of killing him?

We respectfully submit that there can be no doubt that where the greater right exists it includes the lesser right.

Let me carry my illustration a step further. Let us suppose, for the sake of the illustration, that Mr. Wootton and eighteen hundred other men resident within the Warren District were conducting their affairs in a manner that did not meet the approval of Mr. Embree and his associates numbering between thirty-five hundred and four thousand men. Let us assume for the sake of the illustration that they were bound together for the purpose of bringing about destruction to the business of Mr. Wootton and those similarly situated and the destruction of the lives, if need be, of Mr. Wootton and his family and his associates and their families or as many as might be necessary, in the judgment of the conspirators, to the accomplishment of their purpose.

Now, let's further assume that these conspirators had determined

to consummate their purpose on the morning of the 12th of July, 1917, and had begun to carry out such purpose. Can there be any question in the mind of any court that Mr. Wootton and his associates under such conditions would have the right to act together, and would have the right, if need be, to take the lives of Mr. Embree and of his associates then engaged in the effort to carry out the unlawful purpose of their conspiracy? Can there be any question, that if Mr. Wootton were on trial for the part he took in preventing this invasion of his rights and of the rights of his associates, that he would have the right to prove that Mr. Embree and his associates had avowed their purpose to do the things against which Wootton and his associates defended themselves? Would we be less entitled to prove their threats and their purpose because the determination was reached at regularly held meetings of the organization of which Mr. Embree and his associates belonged, by which committees were appointed for the purpose of carrying out their threats and where means were adopted, most reasonably adapted to the accomplishment of their unlawful purposes?

If Embree and his associates were members of a larger organization existing in various portions of the country and the struggle were then on in other communities; if the struggle in the Warren District had been initiated at the request of the members of the same organization at Seattle, Washington, Seattle in turn acting on the request of the members of the same organization in Butte, Montana, would we not be permitted to show this unity of purpose between the several branches of the organization as indicative of the character of the threats they were making, of the objects to be attained and of the purpose that actuated the conspirators in the effort against which Wootton and his associates were defending themselves? If the branches of this larger organization in different parts of the country had appealed to Embree and his associates saying: "Are you now willing to join us in a general effort to carry out the objects of our organization, the objects of our conspiracy," would we not have the right to show that fact? To show the terms of the conspiracy and the extent of it; to show how large was the organization; how widespread the unity of action and the purpose; how determined the conspirators were to accomplish that end, both as to the destruction of the people and the property in the Warren District, and to overthrow the entire system of ownership of property, as well as to accomplish the destruction of the government itself?

That is the charge we make, and that we are prepared to prove. If three men, Mr. Embree, Mr. Kimball and Mr. Tannehill agreed among themselves to go out at a certain time and destroy either the defendant in this case or any other man similarly situated because he was doing something that interfered with their purpose to overthrow this government, to bring about destruction of private property and to bring about the abolition of the system of private

ownership of property, and to put the government of the affairs of the world in their hands, and the efforts of these men, or any of them were directed toward Mr. Wootton, or those whom he was charged with the duty of protecting, or toward his property, would it be contended that he could not defend himself because all of them joined in the effort against him instead of only one? Would not the fact that he was attacked by a large and a powerful organization make all the clearer his right of self-defense? Would the right of his next door neighbor, similarly situated, subject to the same threats, subject to the same result on the part of the conspirators, be any less because two were involved as the object of the attack of the aggressor, or ten, or one hundred, or a thousand, or the community itself constituting the Warren District on that date? Wouldn't common sense and necessities of the case drive those attacked to a unity of action to protect themselves from that purpose and the accomplishment of that purpose by the aggressors?

Now, if the Court please, as has been made manifest to the Court by statement of Mr. Curley as to what we expect to prove, that was the purpose of this conspiracy, which for the sake of description we shall continue to refer to as I. W. W. We are prepared to show, we have the proof, we have the written, documentary proof of the character of the organization, of its avowed purposes, of the objects which were to be accomplished by what they describe as "The revolutionary movement." We have the documentary proof from their own minutes, the minutes of the Bisbee Local of the I. W. W. organization; of their unity of action and purpose with other branches of the Industrial Workers of the World at Butte, at Sand Point, Idaho, at Seattle, Washington, and other places, to bring about the strike at Bisbee at that time and for that purpose.

Let me suggest another illustration. Let us suppose that at the head of Tombstone canyon at the lower part of which is the Town of Bisbee and the homes of thousands of people, there was a large dam that was holding back the waters which were coming down that canyon; that the flood season was on and a committee of ten or one hundred were standing guard at that time, all realizing that it was going to be difficult to impound all the water that naturally comes down Tombstone canyon and to pass it out in safety through the ordinary conduits and subways out into valleys below to the end that no harm be done to the people and the property below the dam.

Now, let us suppose there is another canyon nearby Tombstone canyon and from which waters could be emptied into Tombstone canyon above the dam. Let's assume that the Tombstone dam will hold the waters impounded above it; that the second canyon can carry off the waters naturally flowing in that canyon, but that if the water from the second canyon were turned into the Tombstone canyon it would inevitably break the dam and drown the people in the town below. Could there be any doubt that the representatives of these people who are there at the time, representatives of

the people living in the town below, have the right to act together and for the common purpose of making that flood impossible? Let us, for the sake of our illustration, say that the people who are insisting on turning that water from the second canyon into that reservoir are doing it because if they did not do it their own canyon will be the scene of a devastating flood. Can there be any doubt in spite of this fact, that the men guarding the Tombstone dam would have the right to prevent the water being turned into their reservoir? Certainly they would have that right. Yet, under the law, if the people in the second canyon had the strength to turn the water off of them and into the Tombstone canyon and thereby save the lives of the people in the second canyon, they would have the lawful right to do so. The right of the people guarding the Tombstone dam to prevent the water from the second canyon being turned in upon them and thereby destroying the lives and property of the people under the Tombstone dam, is a perfect illustration of the right of community self-defense. The right of the people in the second canyon of diverting the water from their own canyon into the Tombstone canyon and thereby save the lives of the people of the second canyon, even though at the expense of the people in the Tombstone canyon, is a perfect illustration of the right under the law of necessity. Now, if the people guarding the Tombstone dam find it necessary in order to prevent the water from the second canyon being turned in upon them, to take the lives of those who were endeavoring to so turn the water that the taking of such lives was necessary to protect the lives of the people in the Tombstone canyon below the dam, they would have the clear right to take such lives. If, however, instead of taking the lives of those endeavoring to turn the water into the Tombstone canyon they could prevent such action by taking them, tying them and removing them for a period without the State of Arizona, would it not be their duty so to do instead of taking their lives? If having the right to take the lives of the men guarding the interest of those in the second canyon the men of the Tombstone canyon were justified in killing, can there be any question but what they would be justified in deporting them for the season from the state in order to protect the people under the Tombstone dam, whom they were charged with the duty of defending, and while making the situation safe for those whom they were charged with the duty of protecting at the same time save their opponents from the greater harm they could have lawfully inflicted upon them? We submit that where the right of self-defense exists and life may be taken under the right of self-defense, the right to do anything less than to kill also exists and if less will do, less must be done.

The illustration, I think, clearly puts before the Court our views as to the right of community self-defense and the right of the community under the rule of necessity. Every man under the Tombstone dam had the right to have that dam remain intact and the water carried off in natural channels to the end that there be no

loss of life or property below, and in the protection of that right they would have the right to kill those who invaded that right. This is a clear case of community self-defense. If, on the other hand, the people in the second canyon could only save themselves, their families and their property by diverting the waters from their canyon into the Tombstone canyon, they would have the lawful right to do so, even though it was an invasion of the rights of the people in the Tombstone canyon, because it was the only means of saving themselves from an imminent, overwhelming, irreparable injury, and the means taken would not be out of proportion to the injury threatened. Had the men guarding the Tombstone dam taken the lives of those seeking to divert the water from the second canyon into the Tombstone canyon, it would have been justified under the law of self-defense. Had the men in the second canyon been compelled to take the lives of those guarding the Tombstone canyon in order to divert the water into it even though they did thereby destroy the lives and property of those below the Tombstone dam, they would have been justified in law under the rule of necessity.

We propose to show that a condition existed under which it was the honest conviction, I will say of this defendant for the purpose of this illustration, the honest conviction of this defendant, reasonably arrived at from credible evidence that was before him, that unless he took the part he did in the Bisbee deportation, he and those dependent on him, or his neighbors and friends would lose their lives or suffer irreparable injury to their persons and the loss of property. Have we the right to prove it? We say YES.

Let us say for the purpose of the argument, that Wootton did not know whether he or his family would be killed, but he did know from the avowed purpose of those deported, those creating the condition of peril then existing in the Warren District, that lives would be lost and property destroyed and his and those of his family might be among them. Let us assume that Wootton reasonably believed from credible evidence then before him of the avowed purpose of those in control of and responsible for the condition of danger and terror then existing in the Warren District to bring about or to accomplish their purpose, that they would bring death and ruin to a large number of people in the community indiscriminately. Can there be any question that he would have the right to act to protect himself and those dependent on him? We say, most certainly there can be no doubt about that. The right of community self-defense is one more difficult to invoke than the right of individual self-defense, that is to say: the conditions bringing that right into play less frequently exist. The right to act under the rule of necessity is very much less frequent than the right to act in self-defense. The existence of the right to invoke the rule of necessity is far more difficult to prove, but it is a question of proof, not of the existence of the right. Both rights exist.

A community at last is but the aggregate of the people that make it. The right of self-defense, the right to invoke the rule of necessity exist and must always exist. What is this rule of necessity as distinguished from the law of self-defense?

"Necessity knows no law"—a proverb as old as our law, almost as old as our language, but also a principle recognized by the authorities. As I have heretofore stated, under the law of necessity the rights of another may be invaded, and I respectfully submit that this is true whether the invasion be by an individual or a community. The right to fight fire is an unquestionable right. Often there may be a question as to whether you must fight in your own yard or in your neighbor's yard, but no man whose property is in jeopardy ever doubts his right to fight fire. If your neighbor endeavors to destroy your house by burning it and such action would result or probably result in the death of your wife or child lying seriously ill in your home and all other means failing, you killed him in your yard, you would be clearly within your rights under the rule of self-defense and if, on the other hand, your neighbor had created a condition by which the salvation of your property and the lives of those dependent on you could only be accomplished by the destruction of his property, you would have the right to invade his premises for that purpose. That right in the latter instance would be a demonstrable right, indisputable under the law of necessity.

The courts have held, not once, but repeatedly, that that is a right that exists by virtue of the fact that it is necessary to protect the community and it takes legislative action permitting a recovery to be had against a municipality to enable a person whose property was so destroyed to recover compensation therefor, the act being necessary to prevent the spread of fire, necessary to protect the property of the community. This defense has been uniformly upheld by the courts when suits have been instituted to recover damages for the destruction of buildings in the path of a fire, destruction being necessary to save the property that lay behind it.

Fortunately in the transactions out of which this case has arisen the loss of life is not involved. There was one death on each side, but that has no connection whatever with this defendant. There is nothing to connect him with it. He was in a different part of the Warren District. One man was killed on either side and about the same time, possibly by each other. These killings have nothing to do with this controversy. We say that when we establish the facts set forth in the statement which Mr. Curley had made to Your Honor, Mr. Wootton stands justified under the law of self-defense, or under the law of necessity, as the case may be. If the jury believes from all of the evidence that he was protecting himself against the invasion of his rights, then he is justified under the law of self-defense. If they believe that he and those with whom he acted were acting under the necessity, as they in the reasonable belief of necessity were acting, to protect themselves and those

dependent upon them from overwhelming, imminent, impending peril and that the action they took was not out of proportion to the danger threatening, then he and they are justified under the law of necessity. We say that the right of self-defense existed in the people of the Warren District by virtue of the existence of the conditions set forth in Mr. Curley's statement. Such facts and circumstances clearly disclose the invasion of their rights and the purpose on the part of the deportees of bringing about irreparable injury to the defendant, Wootton, and his associates, and that from the nature of the entire transaction and the means necessary to be used by them against the conspirators, no overt act was necessary except those which were actually done. On the other hand should there be a question in the mind of the jury as to whether or not we had brought ourselves within the protection of the law of self-defense, nevertheless the defendant and his associates were justified under the rule of necessity in that the danger was threatening and was imminent; that the harm to be done was irreparable and that they were not called upon to sit by until the damage had been suffered and it was too late to protect themselves; that the means used were not out of proportion to the evil with which they were threatened. That they only deported, instead of destroying, is a matter for commendation rather than for punishment.

No argument is necessary to show that to entitle a person to the protection of the law of self-defense it is not necessary that the person defending his life should have actually been in danger of losing his life or suffering serious bodily harm. It is only necessary it should have reasonably appeared to be so.

If, under all the facts and circumstances as they reasonably appeared to the defendant at the time he invoked and acted upon his right of self-defense, he appeared to be in danger, he was justified in acting, even though as a matter of fact he was not at the time in actual danger. In other words the exercise of the right of self-defense does not depend upon the actual existence of danger and the actual doing of the overt act evidencing a purpose to injure the defendant, but the right rests upon the appearance to a reasonable mind so situated that such danger existed and that such overt act had occurred. It may be that subsequent developments will disclose the fact that the assailant was only drawing upon the defendant an unloaded gun and that, therefore, the defendant was in no danger of death or other bodily harm, but he reasonably appeared to be in danger and therefore was justified in acting. A man does not have to wait to see whether his adversary is shooting at him with blank cartridges. When an assailant has avowed his purpose that when he meets the defendant he will kill him, or that on a certain date he is going to kill him and he comes at that time with a pistol, even though it is an empty one, in his hand, the defendant is not legally bound to wait to see whether that pistol is loaded or whether the assailant is going to shoot, if the defendant has any real interest in that controversy and a further

interest in worldly affairs. It is his duty to get into action and get in quick. It has become a proverb in the West that the Lord is on the side of the fellow that gets in the first shot.

These rules applicable to self-defense are applicable also to the law of necessity. Upon the appearance of danger under all of the facts and circumstances of the case to a reasonable mind so situated, the defendant is entitled to act to prevent the invasion of his rights. This under the rule of self-defense. Upon the appearance to a reasonable mind under all the facts and circumstances surrounding him, of a danger imminent and irreparable, such person is justified in invading another's right, provided the act done in so invading the right of another is not out of just proportion to the peril sought to be avoided. It is not necessary to sit supinely by until the damage has been suffered. Such is the law under the rule of necessity.

We have the right to show, insofar as this defendant is concerned, what were his circumstances at that time; what was the condition of his mind; what was the condition of the community that he lived in; what the threats were that were being made by a large body of men organized for a definite purpose; what that purpose was and what was the character of the organization and of the men composing it. If the defendant had the right either under the law of self-defense or the law of necessity to protect himself by taking the life of his assailant or one who compassed his destruction, certainly he had the right to anything less than kill him. If one person had that right, then all similarly situated had it. If any had it, then unity of action was justified even though those who acted with the defendant were not themselves actually involved in the danger threatening the defendant. If it were an effort to take the life of one man only, and if the defendant in this case were the only man in the entire Warren District that was in danger that day and his life was being sought by a large body of men, his neighbors and friends, all of his neighbors and friends, all law abiding, all the well disposed people in that community could and should have rallied to his assistance and averted the danger by the use of the necessary force.

At this point I think it may be well to bring to the attention of the Court a matter that is not without its weight in determining and correctly estimating the action of the defendant and his associates in the deportation. It will appear from the evidence that the united action of these people, who for the purpose of description we shall continue to call the deporters, on the 12th day of July, 1917, was under the leadership of the Sheriff of Cochise County, Captain Harry C. Wheeler. He led the movement. He called to his aid hundreds of duly appointed deputies and even a larger number of those who, although they had not been appointed deputies at that time, were capable of acting with him and who in fact during the deportation did act with him. The Sheriff of the county was charged with the duty of protecting the lives and the property

of the people in the community and of seeing that peace was preserved and the laws faithfully executed. The evidence will show that Captain Wheeler believed, as those acting with him believed, that a disastrous riot was imminent. He and his associates believed, and reasonably believed, under all the facts and circumstances then within his and their knowledge, that a large number of people had gathered for the purpose of bringing about a condition under which the private ownership of property would cease and the government of the United States be left without an article of prime necessity in the great struggle in which it was then involved. The Sheriff knew that a large number of people, strangers to the community, had come in for the purpose of carrying out the avowed program of the organization of which they were members or with which they were in sympathy, that is of destroying or so greatly interfering with the industries of the community as to make it impossible for those who owned the mines to operate them, at the same time making it impossible for the government to get the copper that it needed for the prosecution of the war. In the light of the facts known to him, honestly believing, as he had cause reasonably to believe, that such were the purposes of the organization and those who composed it and those who sympathized and acted with it, he formed a plan subsequently carried out by him with the assistance of this defendant and those acting with the Sheriff on the 12th day of July, 1917, of seizing all such persons so threatening the peace and security of the community, and the welfare of the government itself, and having them in his possession by virtue of that seizure and having no jails or other places of imprisonment wherein he might put them, to remove the persons so seized beyond the district and to a point at which no harm could be done by them to the district, its inhabitants or their property. The evidence will show that it was a part of the established tactics of the I. W. W. organization in their efforts to force their will upon the community, or to interfere with the government in the prosecution of the war, to have so many of their members and sympathizers arrested that the jails could not hold them; that they would, therefore, have to be turned loose on that account. Assuming now, for the sake of the argument, and the evidence will show it to be the fact, that the Sheriff of this county and his associates then knew that such a thing had been done in another American city, in a riot of exactly the same kind and under similar conditions, and there were no troops then in the service of the state, all having been taken over by the Federal Government for the prosecution of the war; and assuming as a matter of fact that an appeal for Federal troops had failed because there were no troops to send for that purpose, the army being either engaged in watching the southern border or in course of preparation for the expedition to France; assuming, as the evidence will show, that all appeals for military help had failed; that there was no place to imprison so large a body of men as must necessarily be seized;

that there was no organization by which so large a body could be safely guarded and held; and assuming, as the evidence will show, that it was necessary to the peace and safety of the lives and the property of the people of the Warren District and the continued activities of the government, that the large body of men creating the condition of terror, seized by the Sheriff should be held; assuming, as I have stated, these things,—and the evidence will substantiate the assumption—we assert that there was nothing to be done but for the people of the district, acting under the leadership of the Sheriff, or other chosen leader, and in this instance no better choice could have been made, to seize the men threatening their peace and deport them instead of killing or being killed in the impending riot. It would seem to us that from the statement of the conditions, of what was done, of the reasons for which it was done, there is a full justification for the action of July 12, 1917. The Sheriff as the leader of the citizens of the county took the men so seized to a place where they could be held in safety to themselves and to the community until order could be restored and the ordinary processes of government and of life be resumed in the community.

Under the statutes of Arizona defining kidnaping, there is no distinction between the removal of a man beyond the limits of the state and to another place within the state or even within the same county; therefore, there is no force in the suggestion that is made that they should have been turned over to the soldiers at Naco or at Douglas instead of at Columbus. Captain Wheeler, as leader of the citizens' movement and those with whom he acted, were justified in removing the men to Columbus, New Mexico, provided, under the law of necessity, as it has heretofore been defined, the Warren District was threatened with imminent and irreparable injury to life and property, when they appeared to be in danger of destruction, and when in the reasonable judgment of Captain Wheeler and his associates, honestly exercised, no other or better way presented itself of preserving the lives and property of the Warren District and restoring peace and order to that sorely tried community, such action under the circumstances stated would not only be justified by law, but in my judgment would be worthy of approbation. If as a matter of fact the riot were on, any means necessary—it does not matter what, provided it were not in excess of what was reasonably necessary to stop it—could have been resorted to. If, as a matter of fact, prior to reaching that desperate state the Sheriff and those acting with him wisely determined that it should not reach that state, but that they would make it impossible for those threatening riot to carry out their purpose; if instead of waiting until the armed conflict came, when it would be necessary for the Sheriff and his deputies and those called to their assistance to shoot or be shot down, the Sheriff and those acting with him knew that such timely action would prevent bloodshed, then in that event it became their duty to act in time and

prevent the loss of life. Under such circumstances it was the duty of the Sheriff, as such, to prevent the riot, to avert the loss of life and the destruction of property and if he acted as Sheriff under these circumstances he, and he alone, could be responsible, not the men who acted under him. Captain Wheeler's first duty as Sheriff was to preserve the peace, to maintain order, to protect the lives and property of the people of the district and such was the duty of all that acted under him as deputies. If he acted not as Sheriff but as the chosen leader of the people, acting under the law of necessity to save themselves and their property from threatened destruction, it was as much his duty and the duty of all who acted with him to take the necessary steps to bring about peace in the community and to maintain it, to make life safe and property secure.

The first of all maxims of the law is: "Regard for the people's welfare, is the highest law." At page 1 of *Broom's Legal Maxims* we find it stated:

"This phrase is based upon the implied assent of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good."

There is, of course, a higher degree of sanctity to life than to property. It is all the more important that life be saved than that property be saved under similar conditions. As between life and property, life must be saved. But in law there is only a difference in degree, not a difference in right. A man in his own home has a right to save that home and his property from the unlawful aggression of another just as he has a right to save his life. In the same article of our constitution protection is guaranteed to life, liberty and property. This guaranty has come down to us from the same great document from which all such rights have sprung. It was so declared in the Great Charter. The rights existed before the charter, they were only recognized and declared by it. We shall all agree that under ordinary conditions a man should not go as far as to save his property as his life, that in defense of property only he should stand more from the aggressor before appealing to his natural right, than when life is threatened; but, as stated before, this is only a question of degree and under the law he is justified in defending himself or his property even though such defense may result in death to another. In this case the rights are so intermingled that we shall not make any effort to distinguish one from the other. The right existed in this defendant, it existed in all of his neighbors and all persons so situated and the aggregate of their rights made the right of the community to protection under the law of self-defense or under the rule of necessity.

In 1 *Wharton's Criminal Law*, 167, §126: "Necessity is a defense when it is shown that the act charged was done to avoid an evil

both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil."

I want to call the attention of the Court to the case of *Hale vs. Lawrence*, 21, 714: This is a long case growing out of the great New York fire of 1835, in which suits were brought on account of the destruction of large amounts of property in the fire to save the city.

"The right to take or destroy private property, by an individual in self-defense, or for the protection of life, liberty, or property, (if it can be esteemed a legal right at all) does not appertain to sovereignty, but to individuals considered as individuals; it is a natural right, of which government cannot deprive the citizen, and founded upon necessity and not expediency. It may be exercised by a single individual for his own personal safety or security, or for the preservation of his own property, or by a community of individuals in defense of their common safety, or in the protection of their common rights. A few instances will suffice to illustrate this right. A man may justify taking the life of his adversary where it is necessary to save his own, or destroying his neighbor's property, in some cases, for the preservation of his own. So the people of a neighborhood may justify a trespass on another's grounds to destroy noxious animals; and in a densely populated town, all may unite in destroying a building to stop a conflagration which threatens destruction to the rest."

American Print Works v. Lawrence, 21 N. J. L. 257, is another case growing out of the same fire in New York, although tried in New Jersey. After the New York courts had refused relief, service was had on the defendants in New Jersey in suits brought there.

The Court says: "The right to destroy property to prevent the spread of a conflagration appertains to individuals, not to the State. It has no necessary connection with, or dependence upon the sovereign power. It is a natural right existing independently of civil government.

It is both anterior and superior to the rights derived from the social compact. It springs not from any right of property claimed or exercised by the agent of destruction in the property destroyed, but from the law of necessity. The principle as it is usually found stated in the books is, that 'if a house in a street be on fire, the adjoining houses may be pulled down to save the city.' But this is obviously intended as an example of the principle, rather than as a precise definition of its limits. The principle applies as well to personal as to real estate; to goods as to houses; to life as to property—in solitude as in a crowded city; in a state of nature as in civil society. It is referred by moralists and by jurists to the same great principle, which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard of goods in a tempest for the safety of the vessel; with the taking of food to satisfy the instant demands of hunger; with trespassing upon the land of another to escape

death from an enemy." See 2 Hare's Const. Law, 916, 917; *Rogers v. State*, 127 Pac. Rep. 358, and a number of others referred to by the Court in the subsequent opinion.

I next invite the attention of the Court to some criminal cases in which the rule of necessity has been established by the courts. First in importance is the case of *The Commonwealth v. Blodgett*, 12 Metcalf, (53 Mass.) 56. This case is of controlling importance because it is most strikingly analogous in facts to the case at bar, being a prosecution for kidnapping, in which the defense relied upon by those charged with the crime, was that they acted under necessity.

Another instructive Federal Court case is that of *U. S. v. Borden*, 1 Sprague. In this case necessity was held to have justified a mutiny at sea.

In the *Republic v. McCarty*, 2 Dall. 86, it was held: That the compulsory attendance of a man on a treasonable expedition in order to save his own life justified him under the law of necessity.

In the case of *The Gertrude*, 3 Story 68, it was held that foreign goods brought into the United States under the necessity created by a storm at sea were not so entered as to make the person introducing them liable to the criminal laws of the United States against the unlawful introducing of such goods without a permit from the collector.

In the *William Ray*, (1 Payne), No. 17, 694, it was held that "A vessel which during the existence of our embargo laws departed from one port in the United States on a voyage to another it was obliged by irresistible necessity to put into a foreign port and sell her cargo, was not guilty of a violation of those laws."

We call the Court's attention to the case of *The Commonwealth v. Knox*, 6 Mass. 76, in which a mail carrier blowing his horn on a Sabbath day is held not to have violated the law because of the fact it was a matter of necessity.

THE COURT: That was a grave offense in those days.

Mr. Burges: Very grave and argued with great seriousness in that case.

And in *Murray v. The Commonwealth*, 24 Pac. State 270, the keeper of a lock on a canal was held not to be guilty of violating the laws regulating work on the Sabbath because it was by way of necessity that the work be done.

Now, if your Honor please, after the discussion of the questions which I think must control the evidence to be introduced and the instructions to be given to the jury; a discussion of the principles which we think control in the trial of this case and the application of which are necessary to a right decision thereof, we come back to the actual question before the court at this time. That is, as to the right to make the opening statement of the case to the jury as has been outlined to your Honor by Mr. Curley. Of course, the right to make the statement is clear, if the right to introduce the evidence subsequently is either conceded or established. If Mr. Wootton at the time of the deportation was acting in the reasonable

belief, in good faith entertained, that it was necessary to protect the life of himself and his family, or the lives of those with whom Wootton acted, that Fred Brown should be deported from Bisbee on that day, we are entitled to offer the evidence to show the facts, circumstances and conditions then existing creating the necessity. We are just as much entitled to offer evidence showing the necessity under the rule of self-defense, or the rule of necessity for deporting Brown as we would be entitled to introduce the evidence to justify his killing, had he been killed instead of deported. If, as a matter of fact and of law under all of the facts and circumstances then existing Wootton, or those acting with him, would have been justified in taking the life of Fred Brown to save his or their own or the lives of those dependent upon them for protection, then this defendant and his associates would be clearly justified in imprisoning Brown or removing him from the district for the time being. If it be admitted that Wootton had the right of self-defense, it must be conceded that he had the right to do anything less than taking Brown's life, just as much as he would have had the right to take his life. If facts and circumstances can be shown to exist which would require the submission to the jury of the question as to whether Wootton would have been justified under all of the facts and circumstances existing on the 12th day of July, 1917, in killing Brown, then the same facts and circumstances would justify the submission to the jury of the question as to whether Wootton was not legally justified in doing less than killing Brown. If Wootton's right of self-defense existed and existed to the extent of taking Brown's life, the greater includes the lesser and the right of self-defense must have existed to the extent of doing anything less than taking Brown's life. The existence of the right of self-defense as I have heretofore stated would not depend upon the actual existence of danger to Wootton or his associates or those dependent on them, but on the apparent existence. The existence of that right being dependent on the fact or the apparent fact, the evidence which would establish the fact or the apparent fact, must be submitted to the jury. To refuse to permit the introduction of the evidence showing the necessity for action on the part of Wootton or his associates, is to pre-judge the case and to hold that the right of self-defense does not exist, or the right to act under the rule of necessity does not exist. It would be for the Court to assume the functions of the jury. If the jury is to exercise its functions, the evidence upon which they must act must be submitted to them. If the evidence must be submitted the preliminary statement of what that evidence will be may be made as a matter of right.

If on the morning of the 12th day of July, 1917, or immediately prior thereto, Fred W. Brown was or had been engaged in an effort to take the life of Wootton or those associated with, or dependent upon them and had threatened so to do, and was then in such position as to justify a reasonable man in the belief that he, Brown, was going to carry out that threat, there can be no question but what Wootton would have the right to prove such facts. It is

equally clear that we should not only have the right to prove what Brown was doing, but if he was acting with others and that had been proven, then we would have the right to prove what they were doing—what all were doing. If Brown was acting in conjunction with thousands of others, who had banded themselves together for the purpose of doing things that greatly endangered Wootton's life and the lives of those dependent upon him and his property and that such persons so acting in conjunction with Brown and in the furtherance of a common end, were then acting so as to make reasonably apparent to a reasonable man their purposes and intentions, we should be entitled to introduce the testimony establishing these facts. Wootton would not be confined to the proof that they were seeking to take his life, but could offer evidence of their purpose to take the life of any person dependent upon him and whom it was his legal duty to protect, or who was in morals or law entitled to his protection. Even if such conspirators did not propose to take his life, but were banded together to destroy his property, or property that he had the legal or moral right to protect, we should have the right to establish that fact. We should undoubtedly have the right to establish the purpose for which the conspirators were bound together; the things they sought to attain; the means they were using or endeavoring to use to carry out their purpose, and what efforts they had made to accomplish their ends. Each and all of these things we say the evidence we shall offer will establish. We have the right to establish these facts, whether any part of them has been brought out by the State in its case or not. We are not confined in our defense by any limits the State may fix in the introduction of its case.

If on the morning of the 12th of July, 1917, Mr. Wootton, being a citizen of the City of Bisbee in the lawful pursuit of the ordinary affairs of life, was made aware that an organization had been formed by a large number of persons to bring about the destruction of his business and of his property and the business and property of large numbers of his neighbors and fellow citizens and that the accomplishment of that purpose would probably result in the destruction of the lives of many, or, if as a reasonable man, he was justified in believing and did honestly so believe from the facts and circumstances then existing, that such organization had been formed for the purposes heretofore stated and that those composing that organization were then about to act and that under the facts and circumstances it was impossible to arrest and carry before the courts in the manner prescribed by the statutes each and all the persons so participating; that there were not sufficient jails to hold them; that there was no way that they could be detained under the law until peace could be established and order prevail and the ordinary process of the civil law brought into action, but that safety could be secured, peace established, order maintained and lives of the conspirators themselves saved by seizing them and deporting them beyond the Warren District, (whether within or without the State of Arizona, is a matter of no legal consequence)

then in that event, such a condition of necessity existed as justified Wootton and his associates in acting exactly as they did act in this case, and in doing that thing which the State now charges—the kidnaping of Fred W. Brown. If Wootton had the lawful right, acting in conjunction with his neighbors and fellow citizens, because he honestly believed on evidence that justified a reasonable man in believing that those men against whom he acted, including the complainant Brown, had a fixed and determined purpose to take his life or to destroy his property or to do that which would be an irreparable injury to the community in which he lived in violence and in blood—then he and those acting with him had the right to seize and to hold such conspirators so their purpose of wrong and violence could not be done. If they had the lawful right to take them and to hold them in the Warren Ball Park, they had the equal right to take them and hold them without the State of Arizona, provided, in their judgment, honestly exercised, they believed nothing short of taking them without the state would result in saving the people and property in the Warren District. We assert that the evidence will show that it was a part of the policy of the organization with which Brown was acting at the time of the deportation to bring about the arrest of their members in such large numbers that they could not be confined in any available jail at or in the immediate neighborhood of the scene of their wrong-doing, and that this fact was known to those who were in charge of the deportation and under whom and with whom Wootton acted.

We assert the evidence will show that it was impossible to have held them in safety within, or in proximity to, the Warren District. We assert that the evidence will show that nothing but the seizure and removal of the deportees beyond the Warren District would have prevented violence and bloodshed and that such was honestly believed to be the fact by Wootton and his associates on evidence that justified them as reasonable men in so believing. The exercise of this right by Wootton and his associates was in no way dependent upon the official character of the leader of the movement, Captain Wheeler, then the Sheriff of Cochise County. Their right was an inalienable right existing in them as men and not by virtue of any official character. If the facts existed, or appeared to exist, as we avow our evidence will establish, then Mr. Wootton and those acting with him would have been legally and morally justified in saving themselves and those dependent upon them, and their property by shooting down the men who were endeavoring or proposed to destroy their lives and their property, provided they could not have saved their lives and their property by doing less. If they could have saved their lives and their property by less drastic action, than taking life, it was their legal and moral duty to do so. Their rights and their duty may not be determined in the light of what we now know, or what may now appear to us to be true. The facts and circumstances as they saw them and honestly and reasonably believed them to exist on the 12th day of July, 1917, must control. We have the right, under the

authorities that we have cited and under many more that could have been cited, to prove all of the facts and circumstances as they then existed or appeared to exist. We assert the right to show that a large number of men, probably about eighteen hundred, acted on those facts and circumstances as they then were, or as they reasonably believed them to be. We offer the evidence of the character of the organization; facts essential to the right decision of the case, as without them the proper value cannot be given to their threats. Without the knowledge of the character of the organization and the men composing it, the danger that lay in the threats they were making cannot be determined. The hiss of a chicken snake frightens no one; the rattle of a rattlesnake means danger imminent and overwhelming. Therefore, we must be permitted to show the character of the organization and the men making the threats. This is quite as important as to show the threats that were made. We must be permitted to show the power for carrying these threats out; the number of men banded together to carry them out, all the conditions; the situation geographically and otherwise in which the people on both sides were placed; the industries which the one side was assailing and the other side defending; the character of the means, such as dynamite, to be used in making the assault on the lives and property of the district and the effect of explosions in the shafts of the mines; the danger to the people and their homes, to the isolated families, the men of which were forced to work to earn a living. All these things enter into the case. Without them no picture can be put before the jury of the conditions under which the defendant and his associates acted on the 12th day of July, 1917; conditions reasonably calculated to influence ordinary minds, conditions reasonably calculated to dictate and direct human conduct. All of these things are admissible in evidence for the purpose of showing whether or not on the morning of the 12th day of July, 1917, either one of the following conditions existed in the Warren District:

First, a condition under which the defendant, H. E. Wootton, found himself in reasonable fear of his life or the lives of those dependent upon him, or for the security of the property of which he was lawfully possessed and which he had a right to defend, an effort having then been made, or being then making, by Fred W. Brown and his associates, or any of them, to carry out the purpose of injury to the life or property of Wootton, thereby justifying an action under the right of self-defense.

Second, a condition in which, although no overt act at that time had been directed towards Wootton or those dependent upon him, or those whom he had a legal and moral right to defend such a state of affairs existed in the Warren District, brought about by Brown and his associates, or such an apparent condition existed brought about by Brown and his associates, or apparently brought about by Brown and his associates, as a result of which Wootton and those acting with him reasonably believed the lives of the people or

the security of the property of the district was in such imminent danger of a great and irreparable injury, for the prevention of which no adequate means were found in the law as to justify them in acting under the rule of necessity, as we confidently assert they did act.

I have not laid stress in this argument upon the fact that the United States was then at war; that, our evidence will show that the object of the conspirators—or deportees, if you please, was the embarrassment of the government in the exercising of its functions and the discharge of the obligations it had taken upon itself in entering the war. All of that, we respectfully submit, is entitled to great weight. If it should be said that we were not specially charged with the duty of preserving the government of the United States and protecting it from harm, we reply, that it is a matter of common knowledge that in the time of war the minds of men are not in normal condition. Men do things in the carrying out of a revolutionary program that they would not think of doing to the accomplishment of private ends. Men otherwise law abiding, quiet, and peaceable, men who avoid strife and turmoil, when their country is in danger, do things and rightly do things that under ordinary conditions they would shrink from doing.

A great senator of the United States (Ben Hill of Georgia) once said:

"Who saves his country, saves all things, and all things saved will bless him. Who lets his country die lets all things die and all things dying curse him."

The Supreme Court of California has well said:

"Every State, and every community, has a right to adopt the means necessary to its own protection, and what those means are, the society must judge. The law of self-protection is as applicable to communities as to individuals. Communities are but corporations, or artificial beings, capable of united action through proper organs. Every member of society forms a part of this artificial being, and the State, therefore, has the greatest interest in preserving the lives of its people. The security, power, and greatness, of a State, depend upon the number and character of its population. The State, and each member of the body politic, have a reciprocal interest in the welfare of each other, and owe certain mutual duties and obligations to each." (*People v. Butler*, 8 Calif. 442.)

Counsel for the defense feel assured that a fair consideration of all the evidence in the case, the true measure and comprehension of all the facts and circumstances existing at the time of this most important act in the life of this State, as well as of this defendant, will show that he acted with wisdom and with courage in full recognition of his duty to himself and his country. We respectfully insist that we are entitled to introduce the evidence which will establish the fact that such were his motives and such was his conduct.

March 15.

Mr. French argued at length, citing numerous decisions of State Supreme Courts, that as the act of the defendant for which he was indicted was wholly illegal, the defense of necessity was entirely foreign to the issue. One who arrests another, even with authority, must at once deliver the offender to the officers of the law. And a person who assists an officer is not excused if the officer's act was illegal.

Mr. Worsley argued at length that the law of self defense and necessity were not applicable here.

If that arrest were legally made for the purpose only of protecting that community, it became illegal the moment he refused to give those men their day in court and violated that constitutional provision.

THE COURT: Supposing instead of I. W. W.'s, the community at Bisbee had waked up some morning and found several thousand German soldiers among them disguised as civilians. What legal action could they have taken?

Mr. French: They could have called on the governor of the state. They could have called on the state department. There were soldiers at Naco, almost within sight of Bisbee, was a camp of soldiers. The courts of this land were open. They were functioning at the time, the civil courts, the criminal courts of this county were all open to them. There were processes of law that should have been used.

THE COURT: The sheriff was there, and as they offered to prove, he did in this case, he called for troops and could not get them, could he not then have impounded the enemy forces that he found within his bailiwick? These so-called German soldiers might turn out to be innocent citizens.

Mr. French: The governor, if his attention was called to it and he thought that there was anything in it, that it wasn't the vagaries of a diseased or imaginary mind, would have declared martial law.

THE COURT: Yes, but suppose he didn't. The governor says, "I am too busy looking after my political welfare to bother about an invasion of Germans, or anything of that kind."

Mr. French: He could have gone out and got troops and met the Germans—not gotten rid of his own citizens.

THE COURT: Bear in mind, *Mr. French*, that the offer of proof is to show that practically the I. W. W.'s were German soldiers, maintained for the purpose of assisting Germany.

JUDGE PATTEE: The evidence on the part of the State tends to show that on July 12th, 1917, a large number of persons variously estimated from 1100 to 1200 were forcibly seized at and in the vicinity of Bisbee, marched or conveyed to a ball park at Warren, and there loaded into freight cars and transported into the state of New Mexico. The evidence tends to make a clear case of an unauthorized and unlawful invasion of the rights of the persons thus transported and a plain violation of the section of the Penal

Code of the state of Arizona under which the information in this case is framed.

The information charges the defendant, Wootton, with having kidnaped one Fred W. Brown. The evidence tends to show that Wootton was one of a large number who carried out what has been referred to as "The Deportation," and that Brown was one of a large number deported. The evidence introduced on behalf of the state may or may not be contradicted, but unless the matters testified to by the witnesses for the state are denied, some excuse or justification for the acts of the defendant and those with him is necessary to constitute a defense. To what extent or in what measure the burden is upon the defendant to excuse or justify the act complained of will not now be considered. But it at least devolves upon him to produce evidence which will raise a reasonable doubt in the minds of the jurors tending to prove some justification or excuse. This justification or excuse, if it amount to such, is found in a statement made by counsel for the defendant as to the matters proposed to be proved and to support which evidence is proposed to be offered. The nature of the statements will be considered later in this opinion.

Ordinarily the sufficiency of evidence to constitute a defense is considered after the evidence is offered and received. In this case, however, the somewhat unusual course has been pursued of stating what is proposed to be proven in advance and submitting to the Court the question whether evidence of such matters may be admitted. This course, however, was invited by counsel for both parties in order to determine in advance of the offer of evidence and in advance even of a statement by counsel to the jury whether or not the matters stated amount in law to an excuse or justification, and whether or not evidence tending to prove the matters stated can be admitted. As a rule, the Court should proceed with great caution in passing upon disputed questions of law upon a mere opening statement of counsel, and with still more caution when the immediate question is the extent to which such opening statement may be made and the grounds it may cover. But in this case, in view of the fullness of statement and the extent of argument, the Court is perhaps as well able to pass upon such matters as it would be had the evidence been admitted and the question of law then presented. In such circumstances, however, it is obviously the duty of the Court to permit the opening statement of counsel and to allow the introduction of the evidence sought to be admitted, unless it is clear that the facts stated cannot constitute a defense or unless the matters respecting which evidence is sought to be introduced, with all reasonable inferences to be drawn therefrom, cannot amount to an excuse or justification of the act which is made the basis of the information.

The position of the state is that the matters stated cannot in any view of the law constitute any defense and do not amount to defensive matter, and that all evidence with respect to such matters should be excluded. Such a position necessarily concedes for the

sake of the argument the truth of the matters stated, and thus is presented the question of law brought about by the contention of the state that such matters can in no view and under no circumstances be shown in evidence for the reason that if fully proven they could not be considered by the jury and could not constitute any defense to the charge made in the information.

It is contended by the defendant that the matters stated, if proven, furnish an excuse or justification for the act of the defendant, and those shown to be acting with him, for the reasons: First, that the act was done in the necessary self-defense of the defendant and of the citizens of the Warren District, and; Second, that such acts were necessary by reason of a threatened and overwhelming calamity about to be inflicted upon the citizens of the Warren District, or, at least, that the circumstances were such as to give reasonable ground for belief that this was the situation, and that, therefore, what has been termed in argument the law of necessity applies.

The general rules of law governing the questions presented by the defendant will be considered, and first the law with respect to the right of self-defense. Some of the arguments advanced respecting the law on that subject are mere truisms that must be conceded by everyone. As argued by counsel for the defendant, if one man may defend himself against the attack of another, two may do so, and if two may do so, any number may do so. There is no place in the law where mere numbers, either of the assailed or assailants, either those claiming the right of self-defense or those against whom it is claimed, at all affects the legal question or the assertion of the legal right of self-defense. Any number of men finding themselves in a position where the right of self-defense arises may assert it, and if it extend to an entire community, or to all the persons constituting that community, then the community in the sense of all the persons who constitute it may likewise assert the right. But regardless of the numbers the rules of law regulating the right are the same. The right is no greater in the case of a community in the sense above mentioned than it would be in the case of an individual. The law recognizes no difference in the right of an individual to assert this defense and that of two or more persons, no matter how numerous. The rules by which such matters are to be governed and the law with respect to the right to assert such a claim are not in the least affected by the number of those asserting it.

The law of self-defense as applied to individuals is settled in this state both by statute and by judicial decision. Homicide, and, of course, any injury to a person less than homicide, is justifiable when committed in either of the following cases:

“(1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

(2) When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by vio-

lence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

(3) When committed in the lawful defense of such person, or of a wife or husband, parent, child, master or mistress, or servant, of such person, when there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

(4) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed or in lawfully suppressing any riot or in lawfully keeping and preserving the peace."

And Section 181 provides:

"A bare fear of the commission of any of the offenses mentioned in subdivisions two and three of the preceding section, to prevent which, homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone."

It is well settled under these provisions of the statute that the law of self-defense can only be successfully invoked in a case coming within the express terms of the statute. Mere threats, however violent, or long-continued, or mere fear, however honestly entertained, do not justify the infliction of death or bodily injury in self-defense. One cannot claim the right of self-defense or justify homicide or bodily injury under a claim of self-defense, because of mere threats against the life or person, or mere fear, though well-grounded and honestly entertained, of prospective or future injury or the taking of life, unless the danger appear to be imminent. In every case there must have been some act or demonstration upon which could be based a reasonable ground for the belief that at the time of the killing or infliction of other injury the one asserting self-defense was in imminent danger, and that it was necessary for him to kill or otherwise injure to save himself from death or great bodily harm. The extent or sufficiency of such hostile act or demonstration may depend on circumstances, and violent threats communicated to the party asserting the claim of self-defense may justify action upon a lesser showing of hostility than in a case where no such threats had been made. But the rule is universal that there must be some hostile demonstration. The difference is only as to the extent of such demonstration which is necessary to warrant the party in acting in self-defense, and that depends upon the circumstances in each particular case. Authorities differ respecting the basis upon which the conduct of the one claiming self-defense is to be judged; some holding that the situation is to

be viewed from the standpoint of the defendant, as it appeared to him at the time, and others that the matters are to be looked at from the standpoint of what would appear to a reasonable man under the circumstances to be the situation and the imminence of the threatened danger. Upon that point our statute settles the rule in favor of the latter position. But aside from that, it is settled by Section 181 of the Penal Code that mere fear, without an overt act or demonstration, cannot be made the basis of a claim of self-defense. The authorities upon these matters will be found collated in 21 Cyc., 814, 817 and 819. To justify, therefore, the claim of self-defense, the facts must bring the case within the rule as above stated, and Brown, the person charged with having been deported, must be shown to have been sufficiently an aggressor to bring the situation within such rules. Unless, therefore, there can be shown a situation in which not only threats of violence and fear of violence existed, but such hostile acts or demonstration as warrant the application of the rule of self-defense, that claim cannot be sustained. And unless Brown, either himself committed such hostile acts or made such hostile demonstration, or participated with others therein, the element of self-defense is wanting and cannot be asserted as a defense to the act complained of.

The other rule invoked by the defendant is what is termed the law of necessity, and it has been said that the law of necessity is that law that justifies by virtue of necessity the invasion of another's right. Much that has been said in argument has had reference to both self-defense and the so-called law of necessity. The argument of counsel for both parties respecting both these propositions has to a great extent overlapped. But the two are entirely distinct. The one is defensive; the other necessarily offensive. The distinction has thus been stated by a distinguished writer:

"The distinction between necessity and self-defense consists principally in the fact that while self-defense excuses the repulse of a wrong, necessity justifies the invasion of a right. It is therefore essential to self-defense that it should be a defense against a present unlawful attack, while necessity may be maintained though destroying conditions that are lawful. Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil." Wharton, Criminal Law, Sections 126, 128. *Amer. Print Works v. Lawrence*, 21 N. J. L. 248-257.

The application of this doctrine has frequently been considered in cases similar to that just cited involving the right to destroy property to prevent the spread of conflagration, and in such cases the rule seems to be settled that whenever it is necessary, or reasonably appears to be necessary, that property be destroyed to prevent the spread of fire the right of destruction arising from necessity exempts those committing the destruction from the liabilities that would ordinarily obtain in the case of the invasion of one's property rights by another. (*Hale v. Lawrence*, 21 N. J. L. 714; *American*

Print Works v. Lawrence, 23 N. J. L. 590; *Keller v. City of Corpus Christi*, 50 Tex. 614; *Conwell v. Emrie*, 2 Ind. 265; *Field v. City of Des Moines*, 39 Ia. 575; *Mayor, etc. v. Lord*, 17 Wend. 285; *Mayor, etc. v. Lord*, 18 Wend. 126.) The same rule has been applied where seamen, in order to avoid the perils of the sea on account of the unseaworthiness of the vessel, or to relieve themselves of conditions of intolerable hardship, were guilty of conduct which otherwise would have constituted mutiny, punishable by laws relating to that offense. (*U. S. v. Ashton*, Fed. Cas. 14470; *U. S. v. Borden*, Fed. Cas. 14625.) And the same principle with relation to the seizure of private property by military officers. (*Mitchell v. Harmony*, 13 How. 115.) And likewise as to the destruction of property to avoid the spread of disease, (*Seavey v. Preble*, 64 Me. 120) in which it was said:

"To accomplish this object persons may be seized and restrained of their liberty or ordered to leave the state; private houses may be converted into hospitals and made subject to hospital regulations; buildings may be broken open and infected articles seized and destroyed, and many other things done which under ordinary circumstances would be considered a gross outrage upon the rights of persons and property. This is allowed upon the same principle that houses are allowed to be torn down to stop a conflagration. *Salus populi suprema lex*—the safety of the people is the supreme law—is the governing principle in such cases."

"Where the public health and human life are concerned, the law requires the highest degree of care. It will not allow of experiments to see if a less degree of care will not answer. The keeper of a furious dog or a mad bull is not allowed to let them go at large to see whether they will bite or gore the neighbor's children. Nor is the dealer of nitro-glycerine allowed in the presence of his customers to see how hard a kick a can of it will bear without exploding. Nor is the dealer in gunpowder allowed to see how near his magazine may be located to a blacksmith's forge without being blown up. * * * The law will not tolerate such experiments. It demands the exercise of all possible care. In all cases of doubt the safest course should be pursued, remembering that it is infinitely better to do too much than run the risk of doing too little."

As further illustrating the rule, see *Chesapeake & Ohio Ry. Co. v. State*, 84 S. W. 586.

The law of necessity as laid down by these authorities is based purely upon the natural rights of the individual. It can neither be granted nor taken away by statute. It cannot be vested in any public officer nor the exercise of the right made a part of his official duties. And statutes purporting to grant public officers such right are construed to only prescribe regulations under which such right may be exercised. In speaking of such a case it was said by the Court of Appeals of New York:

"The legislature does not in these cases authorize the destruction of property. It simply regulates that inherent inalienable right which exists in every individual to protect his life and his prop-

erty from immediate destruction. This is a right which individuals do not surrender when they enter into the social state, and which cannot be taken from them. The acts of the legislature in such cases do not confer any right of destruction which would not exist independent of it, but they aim to introduce some method into the exercise of the right." *Wyndhamer v. People*, 13 N. Y. 441.

So also the quaint illustration in Wharton's notes that: "A person whose house is on fire may seize, without incurring the charge of felony, the hose of a neighbor as a means of extinguishing the fire. A person who is bathing and whose clothes have been stolen may snatch up clothing he may find on a clothes-line so as not to be obliged to enter into a village naked." 1 Wharton, Criminal Law, 11th Ed. 169.

And the more serious statement that: "If the safety of a city require that a house should be destroyed by gunpowder, and supposing there be no time to rescue all the inmates of the house, the killing of one of such inmates under the circumstances would be excusable."

Idem. 815 furnish instances of the application of the rule of necessity.

Without attempting to follow the elaborate arguments of counsel and the numerous authorities to which they have referred, it seems clear that there exist what is known as the rule of necessity applicable in some cases under circumstances of unavoidable peril, and when properly invoked, furnishing an excuse to one committing acts which would otherwise constitute a criminal offense. This rule is ordinarily invoked in cases involving the destruction of property, but in extreme cases may extend to the deprivation of life or liberty. Of course, there is a higher degree of sanctity in liberty or life than in any mere property right. The destruction of property is of vastly less moment than the deprivation of liberty or the taking of life, but the difference is not in kind but merely in degree, and to warrant the deprivation of liberty or life only requires a higher degree of peril than would warrant the destruction of property. As was said in *Hale v. Lawrence*, 21 N. J. L. 714:

"It (referring to the law of necessity) is a natural right, not appertaining to sovereignty but to individuals considered as individuals. It is a natural right of which government cannot deprive the citizen and founded upon necessity and not expediency. It may be exercised by a single individual for his own personal safety or security, or for the preservation of his own property, or by a community of individuals in defense of their common safety or in the protection of their common rights. It is essentially a private and not a public or official right. It is a right not susceptible of any very precise definition, for the mode and manner and the extent of its exercise must depend on the nature and degree of the necessity that calls it into action, and this cannot be determined until the necessity is made to appear."

No doubt one seeking to justify what would otherwise be an unlawful act on the plea of necessity has the burden of showing

that such necessity existed, and he must show that the anticipated peril sought to be averted was not disproportionate to the wrong, and to justify the deprivation of liberty he must show that the peril which called for such action was of a higher and more serious character than one which might justify the destruction of property or the invasion of property rights. "He who relies on the warrant of necessity or goes beyond the boundaries which ordinarily separate right from wrong takes the risk upon himself of proving that the circumstances were such as to justify his conduct." (*Hare's American Constitutional Law*, Vol. 2, 912.) And only where the threatened peril is immediate and overwhelming, or so appears to a reasonable man under all the circumstances, and can only be averted by violence of the character involved in this case, can the law of necessity be invoked to justify the use of such violence.

Much reliance is placed by counsel for the state upon *Ex parte Milligan*, 4 Wallace 2, and that case was commented upon by counsel for both sides.

Without attempting to quote from or to analyze the elaborate opinion of the court, it may be summed up by saying that the ruling was that in a state like Indiana which had not participated in the rebellion, whose courts were at all time open for the hearing of causes and the determination of the rights of parties, no extraordinary tribunal like a military commission could be given power to try the citizen for an offense and to sentence him to deprivation of liberty or life. And in passing upon these questions the energetic language of Mr. Justice Davis dwelt upon in argument of this case is that: "No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its (the Constitution of the United States) provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. But the theory of necessity on which it is based is false; for the government within the constitution has all the power granted to it, which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

The necessity spoken of here must necessarily refer to the claim of necessity made in that case. And that was what? Not the law of necessity spoken of in the cases and text books before cited; not the law of necessity invoked on behalf of the defendant in this case; but the necessity for the creation and establishment of an extraordinary tribunal not provided in the Constitution or the laws of the United States, to supersede or act concurrently with the duly established courts of the land. And again:

"Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because the courts had declared penalties against the offenses charged, provided for their punishment and directed that court to hear and determine them," was said with

reference to the necessity of establishing a military tribunal and endowing it with power to hear and determine cases involving offenses which could as well have been heard before the duly constituted courts. No one can question the correctness of the decision in *Ex parte Milligan*. No one can properly seek to lessen the force of the decision nor the language used in announcing it. It is clear, however, that that language only relates to the situation then presented, and bears only upon the questions discussed by counsel and presented to the court for decision. As was said by the Supreme Court of Appeals of West Virginia in *State v. Brown*, 77 S. E. 243:

"It was against the attempted misapplication of martial law to the specific state of Indiana and her citizens on the ground of the existence of a state of actual war in other portions of the Union but not extending into Indiana, that the thunderous eloquence and invincible logic of Garfield, Black, McDonald and Mr. Justice Davis was directed."

Many of the decisions cited by counsel for the defendant are cases based upon situations growing out of declarations of martial law by state executives, or a modified form of martial law in particular portions of a state. Many of them justify such declaration and the proceedings of military officers in detaining persons whose being at large might be inimical to the public welfare. One or two sustain the right under certain conditions to establish a military tribunal with authority to try and sentence those found guilty of public offense. Most of them, however, justify nothing more than temporary detention, applying in full the rule laid down in *ex parte Milligan* with respect to the power to create a military tribunal and the power of such a tribunal to pass upon the guilt or innocence of one charged with a public offense. (*Ex parte McDonald*, 143 Pac. 947.) But these cases, while perhaps enlightening, do not seem to affect any question involved in this case. Martial law had not been declared in the Warren District, nor, under the claim set up by the defendant, were he and those associated with him acting as military officers. Whatever power the Sheriff might have when properly acting as an officer of the law, the character of the claim made by the defendant in this case is such as to preclude any idea of justification or excuse on that ground. If, as contended and as held by the authorities before cited, the rule is confined to the narrow limit of protecting a person or a community against imminent peril, by an invasion of the rights of others demanded by a great and overruling necessity, such right is a natural one merely and is wholly apart from any constitutional or statutory authority vested in military or peace officers.

It is urged with great earnestness by counsel for the state that an officer of the law arresting a person accused or suspected of crime, with or without warrant, must take the person arrested before a magistrate or proper tribunal, and failing to do so his conduct becomes wrongful and subjects the officer to both criminal

and civil liability. The authorities cited abundantly sustain that position. One arresting an offender without a warrant must take him before a proper court or magistrate, and in the event of his failure to do so is liable to a civil action brought by the person arrested or to a criminal prosecution. (*Brock v. Stimson*, 148 Mass. 520; *Phillips v. Fadden*, 125 Mass. 198; *People v. Fick*, 26 Pac. 759; *State v. Parker*, 75 N. Car. 189; *Johnson v. Americus*, 46 Ga. 85.) Nor can there be any doubt as to the correctness of the proposition urged by the state that one arresting under process valid upon its face must strictly pursue the command of the process, and that a failure to do so or a going beyond the authority given by the process renders the act of the arresting officer illegal *ab initio*. (*People v. Fick*, *supra*.)

One arresting lawfully without a warrant must promptly take the person arrested before a magistrate and cause a proper warrant to be issued, also his action, though originally legal, will become void from the beginning. (*Pastor v. Regan*, 30 N. Y. Sup. 657.) So also an arrest may not be made upon information communicated by telegraph from officers of another state without some more reliable information warranting the belief that a crime has been committed. (*Malcomson v. Scott*, 23 N. W. 166; *Cunningham v. Baker*, 16 So. 68.) The statutes of this state prescribe the duties of officers making arrests substantially in conformity with the rules laid down in the authorities above cited. Thus, under Section 843, Penal Code, relating to arrests upon a warrant properly issued, it is provided that if the offense charged be a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or in the case of his absence or inability to act, before the nearest or most accessible magistrate in the county. And under Section 844, if the offense be a misdemeanor, the officer must bring the accused before a magistrate of the county where the arrest is made. And by Section 850 it is provided that an officer who executes the warrant shall take the defendant before the nearest or most accessible magistrate in the county in which the offense is triable, in cases where the warrant is issued by a magistrate of a county other than that in which the offense was committed. Section 852 provides that an arrest may be made by a peace officer or a private person, and Sections 854 and 855 provide: "A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person: (1) For a public offense committed or attempted in his presence. (2) When a person arrested has committed a felony, although not in his presence. (3) When a felony has been committed in fact, and he has reasonable cause for believing the person arrested to have committed it. (4) On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested. (5) At night, when there is a reasonable cause to believe that he has committed a felony." "A private person may arrest another: (1) For a public offense committed or attempted in his presence. (2) When the person arrested has

committed a felony, although not in his presence. (3) When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

Section 867 of the Penal Code provides: "When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person must be laid down before such magistrate."

No doubt can be entertained, therefore, that the plain duty of an officer or a private person making an arrest is to promptly, or, in the language of the statute, without unnecessary delay, take the person arrested before a magistrate that further proceedings may be had against him in accordance with law. Nor can there be any doubt that for a failure to perform that duty the arresting officer or person is liable both civilly and criminally. Nor can there be any doubt that the forcible taking of the person arrested outside the limits of the state is a gross and inexcusable violation of the duty of the officer or person making the arrest, and he cannot be heard to justify such act by claiming that he acted as an officer or by command of an officer in making the arrest. The evidence so far introduced only identifies the defendant, Wootton, and a few other persons of the large number who associated in the taking of Brown and others to New Mexico. But in the facts offered to be proved by the defendant it is asserted that Wheeler, then Sheriff of Cochise County, was in command of the body of men who carried out the deportation. No claim is made that there was any taking of Brown or any of the persons deported before a magistrate. On the contrary, the evidence already given on behalf of the state and that proposed to be given on behalf of the defendant conclusively shows that so far from being taken before any court, a complaint filed and a warrant procured, or any other proceedings taken, the parties seized were promptly carried out of the state to a point where no proceedings could be had against them, and there left. The result is that Wheeler could not legally justify his conduct on the theory that he was a peace officer acting in the performance of his duty. Nor can the defendant justify on the ground that he was a deputy of Wheeler or a member of a *posse comitatus* summoned by Wheeler to assist him in the performance of an official duty. In the argument of counsel for the defendant the responsibility of a member of the *posse comitatus* was barely touched upon, and the question was really not presented. But counsel for the state in his argument cited persuasive authority to the effect that a member of a posse cannot justify his action unless the officer summoning the posse was in turn justified. The rule stated by such authorities is that an officer has no right to command another to perform an unlawful act, and one summoned by an officer to assist him acts at his peril, and regardless of his individual good faith his conduct cannot be justified if the action of the officer summoning

him was in turn illegal. (*Mitchell v. State*, 12 Ark. 60.) Neither Wheeler nor any of those associated with him in the so-called deportation can justify by virtue of official action. But this is the extent and limit of the rules stated in the authorities cited by counsel for the state on that subject. It does not in the least affect the application of the rule of necessity if that rule be applicable. The right to act because of necessity is, as shown by the authorities before cited, a natural right vested only in persons as individuals and cannot be vested in any public officer, though its exercise may be subjected to statutory regulations. Neither Wheeler nor his deputies nor those acting at his command could as officers or aides to an officer act under the law of necessity. If they so acted they must necessarily have acted as individuals and as members of the community, and in so doing they could not avail themselves of any rights that the law gives to an officer nor be subject to liabilities for the violation of the duties of officers. Their acts were entirely beyond and outside, and must so have been of any official duty, and their right to claim to be excused on the ground of necessity depends upon the existence of a situation which would warrant individuals in acting under that rule.

It remains to apply these general rules of law to the facts sought to be proven by the defendant. The statement of the matters upon which evidence is intended to be offered has been reduced to writing and submitted to the Court. A copy is appended to this opinion. It is obvious that the matter set forth in the last paragraph of the statement is a legitimate subject of proof. The statute upon which the information in this case is based provides that:

"Every person who forcibly steals, takes or arrests a person in this state and carries him into another country, state or county * * * is guilty of kidnaping."

To constitute the offense charged the carrying must of necessity be forcible, and if the person claimed to have been kidnaped went voluntarily or without the use of force the crime charged was not committed. Granting, as contended by the defendant, in argument upon another point, that the crime was as complete when the person claimed to have been kidnaped was taken to the Warren ball park as when he was taken into New Mexico, the state is necessarily held to proof of the particular offense charged, and that is that the party was carried from this state into the State of New Mexico. If, therefore, the transportation of Brown into New Mexico was not of the forcible character required by statute in order to constitute the crime, but was voluntary on his part, the proof of the crime fails, even though the accused might have been charged with kidnaping and transporting Brown from Bisbee to the ball park.

As to the claimed right of self-defense, the matters stated in the offer of proof fall short of bringing this case within the ordinary rule. According to that statement, there were threats

of violence, there was preparation for the commission of violence, there were assaults committed, though it is not asserted upon any of the persons involved in this case; but there was nothing else. Defense presupposes an attack and self-defense can only be resorted to when there is some hostile act or demonstration directed against the person asserting the claim. Threats are not sufficient, and preparation for an attack is not an attack. They may warrant preparation for a defense, but not the invasion of the right of another or the injury of another on the ground of self-defense. Applying then the ordinary rules governing the right of self-defense as laid down by our statutes and the authorities before cited, the facts proposed to be shown by the defendant fall short of laying a sufficient foundation for the assertion of such a right.

As to the rule of necessity: It has been shown by the authorities before cited that there is such a rule and in a case justifying its application the party acting by reason of necessity is excused from the consequences of what would otherwise be a criminal act. The cases are and must be rare and conditions exceptional in which such a rule may be invoked. No case exactly like the present has been found in which it was invoked. Nevertheless, the rule remains, though, as stated by the authorities, it is difficult to define its extent or the cases in which it may be applied. Each must necessarily stand upon its own facts, and as no two cases are exactly alike, necessarily as each arises the application must be made according to the nature of the situation presented. The unusual character of the defense and the infrequency with which it is claimed naturally requires caution to see that a case is presented justifying the accused in invoking the rule. Naturally the first impression the mind entertains is that such a defense is rather a desperate attempt to escape the consequences of criminal conduct than a *bona fide* excuse for such conduct. But if the defense be asserted and evidence presented which comes within the rule as laid down by the authorities, it must be passed upon as any other defense, and it may be said in passing that in this case, though it may have aroused great public interest, no different rule obtains than in a case of less importance. It stands exactly in the same position and should be considered in the same manner as a case where one obscure citizen is charged with kidnapping another equally obscure, and in which no public interest has been manifested and no animosities engendered. Ordinarily the question here involved is one of fact to be determined by the jury. As was said in *Hale v. Lawrence*, 21 N. J. L. 714:

"This justification, therefore, under a plea of necessity is always a question of fact to be tried by a jury and settled by their verdict, unless the sovereign authority shall have constitutionally provided some other mode."

This, of course, must be taken to mean that where there is evidence tending to establish such justification, its weight and sufficiency are for the jury, and the Court may pass upon it as a matter of law only where evidence is wholly wanting and may

exclude proof of a given state of facts only when that state of facts could not in any event warrant the interposition of this plea. A case much discussed as involving both the right to assert this defense and the manner in which it should be determined is *Commonwealth v. Blodgett*, 12 Metcalf, 56. This case grew out of a controversy that arose in Rhode Island, sometimes referred to as Dorr's Rebellion, in which one Thomas W. Dorr was the head of an insurrection "to overthrow by force of arms the government and the constitution of that state, and to impose and substitute another government and constitution in its stead." The prosecution was against certain persons who had acted as members of the military forces of the regular government of the State of Rhode Island under command of a military officer of that state. The charge was that of kidnaping based upon the statute of Massachusetts, differing in language from ours but of the same general nature. It appeared that the followers of Dorr, including the persons alleged to have been kidnaped, had been dispersed and scattered into the adjacent states of Connecticut and Massachusetts. Four of such persons with whose kidnaping the accused were charged had taken refuge in Massachusetts and at the time of the alleged kidnaping were at a house within the state of Massachusetts wholly unarmed and at the time conducting themselves in a peaceful manner. The accused came to the house where the persons referred to were stopping, seized them in the middle of the night, carried them to the state of Rhode Island and turned them over to the military authorities. Among other defenses asserted was the plea of necessity in that it was necessary to the safety of the citizens of Rhode Island and their property, and the state of Rhode Island itself, that these insurrectionists should be seized and their potential activities prevented. In support of this defense evidence was given respecting the conditions existing at the time of the seizure of the persons referred to, and of the history of the rebellion in Rhode Island, which gave rise to their capture. The trial court instructed the jury that "if there existed a necessity for the defense or protection of the lives and property of the citizens of Rhode Island, or for the defense of the state of Rhode Island, that the defendants should do the act complained of in the indictment, or if there was probable cause at the time to suppose the existence of such necessity, and the jury found such necessity or probable cause of necessity, then they were to acquit the defendants." And again the trial court also gave an instruction that "such capture by the troops of Rhode Island under the orders of Rhode Island was unlawful unless necessary in defense of the lives and property of the citizens of Rhode Island, or in defense of the state at the time; of which necessity or probable cause of necessity, or that there was probable cause at the time to suppose the existence of such a necessity, the jury and not the State of Rhode Island was the proper judge." The case was one of great public interest, and the matter out of which it grew is a historical incident of importance. All the questions

raised in the case were discussed at great length in an opinion delivered by Chief Justice Shaw. Counsel vie with each other in their tributes to the learning and ability of that great jurist, and undoubtedly his utterances are entitled to the greatest weight as authority. The propriety of the instructions above quoted was considered by the court and their correctness upheld, and the court summed up its conclusion with respect to them by saying that, "on the whole, the court are of opinion that the instructions were correct and carefully considered," and the exceptions were accordingly overruled. The similiarity in many respects of the situation presented in that case with that involved in this and the great weight to be given to the statements of the court which rendered the opinion, and especially to the eminent jurist in whose language it was couched, caused the Court to invite consideration of it by counsel for both parties. The state has attempted to draw a distinction between that case and this in that in this case the parties claimed to have been kidnaped were taken out of the state to a place where for any infractions of law that may have been committed they could not be proceeded against, and in that case the parties were taken to Rhode Island where suitable proceedings might be had against them for their participation in an insurrection against the lawful authority of the state. The soundness of this attempted distinction is not perceived. The crime of kidnaping as defined by our statutes requires neither malicious purpose nor criminal intent beyond the intent to commit the act which is made unlawful. The purpose of the act is not material, and no unlawful purpose need be alleged or proven. If the act itself is unlawful it constitutes the crime regardless of the purpose or intent of the perpetrator. The crime is as completely established by proof of an unlawful carrying of another person from one state to another for the purpose of prosecution as for any other purpose however unlawful. (24 Cyc. 798; *State v. Backarow*, 38 La. Ann., 316; *People v. Fick*, 26 Pac. 760; *John v. State*, 44 Pac. 51.) If one is taken forcibly and without proper legal proceedings from one state to another for the purpose of being prosecuted in the latter state for a crime committed there, those taking him are guilty of kidnaping. The one kidnaped may be prosecuted after his removal to the state in which the crime is claimed to have been committed, and he may not complain of the manner in which he was brought into that state, because he does not in his own person represent the sovereignty of either state, and only the state can complain. (*Ex parte Moyer*, 85 Pac. 897.) But the state from which he was taken may prosecute those doing the taking, and it is no defense to a charge of kidnaping that the purpose was to bring the person kidnaped before a proper court for prosecution. This is abundantly shown by *Mahon v. Justice*, 127 U. S. 700, and the numerous cases cited in the opinion. Had the persons claimed to have been kidnaped in this case fled to New Mexico and had the accused gone to that state and forcibly brought them back into this state, the crime of kidnaping (unless

some excuse or justification other than the purpose of prosecuting had been shown) would have been as complete as would a forcible taking in the opposite direction. Indeed, such is the provision of the very statute under which this prosecution is brought. Section 185, Penal Code of Arizona, provides that:

"Every person who forcibly steals, takes or arrests any person in this state, and carries him into another country, state or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state * * * and every person who, being out of this state, abducts, or takes by force or fraud any person contrary to the laws of the place where such act is committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping."

The crime involved in this case may therefore consist either in forcibly taking a person out of the state into another state, or from another state into this, and no distinction is made between the two acts that constitute the particular offense. If it were lawful to forcibly seize a person suspected or accused of crime and bring him from another state into the state where the crime is alleged to have been committed, and such purpose would relieve those committing the seizure from criminal responsibility, the distinction urged by the state would be well taken. But where the offense is precisely the same and the object of the seizure in no way relieves the act from criminality, it can make no difference and can in no way militate against the force of the authority cited. *Commonwealth v. Blodgett* is therefore a direct authority in support of the view that the question of necessity is one for the jury.

It was urged with great earnestness by one of the counsel for the state that, conceding for the sake of the argument, the right to arrest the persons claimed to have been kidnaped and to place them under restraint or in confinement, as a matter of law there could be no necessity for removing them outside the state. It is difficult to differentiate between different part of the transaction. Indeed, under the circumstances shown by the evidence introduced on behalf of the state and that proposed to be introduced by the defendant, the whole transaction may be regarded as one act. As was said in one of the cases cited by the state, "in this case the arrest of the woman and her conveyance into Placer County and there placing her in the house of China Molly, constitute one continuous act, and for the purpose of determining the intention of the defendant when he made the arrest or at any other time when he had the woman in custody, it is proper to look at the entire transaction as one act, from its beginning to its consummation." (*People v. Fick, supra.*) The offer of proof made by the defendant asserts that the circumstances gave rise to the necessity to not only remove the parties deported to the ball park, but to remove them such a distance as would avoid the threatened danger. The somewhat fanciful suggestion of counsel for the state that

the persons captured might have been required to construct for themselves a place of confinement within the limits of this county is not entitled to serious consideration. No authority exists in law to require any such action on the part of a person arrested. Undoubtedly the rule of necessity is one that can arise only on rare occasions and should be confined within the strictest limits. Even though a necessity existed warranting such measures as were taken in this case, if at any time the accused went beyond the limits of necessity, or of what reasonably appeared to be necessary, the necessity then ceased to exist, and thereafter criminal responsibility would attach to any further acts committed, but this upon the matters stated in the offer of proof is a question for the jury.

The state in taking the position it does necessarily assumes for the sake of the argument the truth of the statements made in the offer of proof, and necessarily concedes for the same purpose that the proof will measure up to the offer. Summarizing that offer of proof, so far as is necessary for consideration of the matter submitted, it is that about the year 1908 a conspiracy was entered into by a large number of persons having as its ultimate object the overthrowing of the government of the United States; and that to carry out the purposes of the conspiracy various means were resorted to and various acts performed which need not be stated in particular. But among them was the destruction of property of large value and the taking of the lives of various people. That upon the entry of the United States into the war with Germany the conspirators adopted various means to obstruct the prosecution of the war by the United States through interference with the production of materials necessary for that purpose, by opposing the enforcement of the laws relating to the drafting of persons suitable for military service, and to assist the enemies of the United States by hindering or obstructing this country in the prosecution of the war. That such conspiracy had grown until the number of conspirators exceeded 200,000; that among the means adopted was the calling of strikes in various industries engaged in the production of material necessary for the conduct of the war, and that about June 26th, 1917, such a strike was called in the Warren District, which district embraced some of the largest copper mines in the United States and produced a large proportion of the world's copper supply; that such strike was not called for the purpose of securing better working conditions or higher wages, but for the sole purpose of embarrassing and defeating the United States government in the prosecution of the war with Germany and as a step in the destruction of private ownership of property, which purposes were admitted by those responsible for and in charge of the strike. That for the carrying out of these purposes a large number of persons styled conspirators, which number exceeded 3,000, had just prior to the 12th day of July, 1917, gathered together in said Warren District for the purpose of destroying the lives and property of persons within said

district, including the defendants named in these various cases, and their families. That just prior to the 12th day of July, 1917, those so gathering in the said Warren District had from time to time assaulted various persons and were continuing to assault many persons, and had just prior to the last-named date stored and hid out within said district large quantities of dynamite and other high explosives for the purpose of destroying the lives and property of persons then within the Warren District, and had threatened such destruction, and that it was the avowed purpose of such persons to destroy the lives and property of persons within the Warren District other than the conspirators themselves upon or immediately following the 12th day of July, 1917. That on the evening of July 11th, 1917, one of the leaders of the conspirators and a member of the committee in charge of the strike notified the then Sheriff of Cochise County that he would no longer be responsible for the acts and conduct of the persons contemplating the acts before-mentioned, and that such persons had just prior to the 12th day of July, 1917, stated that they had large quantities of fire-arms and ammunition hidden within the Warren District for the purpose of destroying the lives of persons in said district other than themselves. That these conditions and threats were just prior to the 12th day of July, 1917, conveyed to the then Sheriff and to those acting with him on that day, including the defendant, and that acting upon such conditions and such information the Sheriff attempted to procure assistance from the Governor of the state of Arizona and from the federal government, and to secure the sending of troops into the Warren District for the purpose of protecting lives and property from death and injury then imminent and being threatened, and believed by the Sheriff and the various defendants as reasonably prudent men to be imminent, but that no troops were sent and no aid extended by the state or federal government. That the numbers of those styled conspirators and the contemplated unlawful acts before-mentioned were constantly increasing, and large numbers of men were coming into the district. And thereupon, believing as reasonably prudent persons that immediate action was necessary in order to save the lives and property of the persons within the Warren District from destruction at the hands of the persons before-mentioned, it was necessary that the so-called conspirators be immediately removed from the Warren District and delivered to some organized authority sufficient in number and sufficiently equipped to detain them and prevent their return into the Warren District for the purpose of carrying out their purpose and to prevent other persons from assembling in great numbers and releasing them and enabling them to carry out such objects, the defendant in connection with the Sheriff and others, did cause the persons styled conspirators, among whom were the persons claimed to have been deported, to be removed from the Warren District and delivered to the military authorities at Columbus, New Mexico, who thereupon accepted and thereafter detained them. And it is

further offered to be shown that Fred W. Brown, the person named in the information herein, was one of the conspirators and was actively engaged with the other persons in the furtherance of and in the carrying out of the objects and purposes before-mentioned.

Laying aside for the moment the offer of proof with respect to a conspiracy existing long prior to the acts complained of, the offer of proof as to conditions existing in the Warren district at the time of the so-called deportation, the purpose and intent of the persons deported, the contemplated destruction of lives and property within that district, the preparations to carry out that intent and the acts and conduct as well as the statements of the persons deported, present a situation where it cannot be said as a matter of law that the rule of necessity cannot be applicable, but rather leaves the question of the existence of such necessity to be determined by the jury as a question of fact under proper instructions. If such were the conditions and the citizens of Bisbee had called in vain upon state and federal authorities for protection against a threatened calamity such as is set forth in the offer of proof, it cannot be said as a matter of law that they must sit supinely by and await the destruction of their lives and property without having the right to take steps to protect themselves.

It ought not to be necessary to state that the Court has nothing to do with questions of fact except to see that they are properly submitted to the jury, and can neither pass upon nor express any opinion upon the question whether the conditions claimed to have existed in the Warren District in fact existed. Many statements were made by counsel in argument in the way of controverting or denying the existence of the situation claimed, and while such arguments may have been well enough in order that the position of counsel might not be misapprehended and that it might not be thought that they conceded the actual truth of the matters claimed, it is obvious for the purpose of passing upon the questions presented both the state and the Court must act upon the assumption that the facts stated in the offer of proof will be shown, and that the proof when presented will fully measure up to the offer. Nor ought it to be necessary to again state that when a defendant in a criminal case offers to produce evidence in support of a claimed defense, such evidence can only be summarily excluded and the defense entirely rejected when it clearly appears as a matter of law that the evidence if received could not tend to prove any legal defense. The Court does not attempt to say what were or were not the facts surrounding the act complained of, nor what conditions existed at the time. It only holds that upon the facts set forth in the offer of proof the question is one of fact for the jury and not one of law for the Court.

So far the offer of proof made by the defendant has been taken as a whole and the questions presented at such length have been considered with reference to that offer taken in its entirety. But many matters set forth therein may be subject to well-founded objection. The question of necessity may be governed by the

conditions and the situation as they existed at the time of the commission of the act and immediately prior thereto at the place or in the vicinity of the commission of the act, and evidence as to matters preceding may not be admissible. In cases like many of those cited where the claim of necessity existed with respect to the destruction of, or injury to property, it is obvious that the necessity depended upon the situation as it existed at the time of the destruction. One claiming the right to destroy buildings to prevent the spread of a conflagration must necessarily have that right determined by the condition existing or appearing to a reasonable man to exist at the time of the destruction; that a conspiracy had been formed to start the fire would be wholly immaterial. So in this case it may be that the claimed conspiracy antedating the conditions, whatever they may have been, in the Warren District at and prior to the so-called deportation, may be entirely outside the evidence legitimately admissible. It does not appear clearly that the persons charged with the kidnaping had any knowledge of such conspiracy or acted upon any information as to its existence. It was said in one of the cases cited that after-acquired knowledge cannot justify an illegal arrest, and so after-acquired knowledge may not be admissible upon the question of necessity. It may be that the right to act under the stress of necessity must be determined by the conditions existing at the time of the commission of the act done under such claim of right, and that the proof bearing upon the necessity must be limited to that extent. The question was not discussed by counsel and is too serious to be passed upon without such discussion. It would seem, however, that the proof should first show what those conditions were before any evidence of an antecedent conspiracy to bring about those conditions could be shown, and after the submission of evidence respecting existing conditions the Court would then be in a position to determine whether the other evidence is admissible. The attention of counsel is called to the case of *People v. Schmidt*, 165 Pac. 555.

The questions discussed have been presented before the opening statement of counsel for the defendant and bore as well upon his right to make such statement as to the admissibility of the evidence proposed to be introduced. The character as well as the extent of an opening statement of a case to the jury is left much to the discretion of the trial court, and while the right to make such statement is a matter of right, the Court may place such limitations upon that right as in its discretion are deemed proper. (*U. S. Fidelity & Guaranty Co. v. Postker*, 102 N. E. 372.) To avoid possible prejudice and a statement of matters which after argument might be held inadmissible, counsel for the defendant will not be permitted to make any statement with reference to the alleged conspiracy existing outside the Warren District, but will confine himself to a statement of what he proposes to show with respect to conditions in that district at and prior to the time of the so-called deportation, and the acts and conduct of the parties

accused and those claimed to have been deported. No prejudice can result should the evidence of a conspiracy be held admissible, because the jury will undoubtedly be able to appreciate its scope and purpose, and if admitted it will be a subject of discussion by counsel in the closing argument and of the Court in its instructions. But the Court is in grave doubt as to the admissibility of such evidence and will require, therefore, the exclusion of all reference to it until its admissibility can be properly determined.

Much has been said respecting the effect of a mere statement of the matters sought to be shown by the defendant and the prejudice likely to arise in the minds of the jurors from such statement, and the assertion that the mere mention of the name of a certain organization will give rise to such feeling on the part of the jurors that a fair consideration of the evidence cannot be obtained. But the Court cannot believe that substantial citizens of Cochise County of the character of those empanelled as jurors in this case are so lacking in intelligence or so wanting in appreciation of their duties as to be influenced by any such matter, or that the fear that a verdict will be based on prejudice instead of proof has any substantial basis.

The foregoing are the views of the Court as to the rules of law and their application to this case, formed after careful examination of the authorities cited and full consideration of the arguments presented, and these views will govern the further proceedings in the trial of this case.

THE EVIDENCE FOR THE DEFENCE.

Fred W. Brown (recalled): The strike was called by the Industrial Workers of the World (Metal Mine Workers' Union), commonly known as the I. W. W.'s. I attended their meetings several times. I was in sympathy with the strike. I was never a member of the I. W. W.'s. I belonged to the retail clerks' union, affiliated with the American Federation of Labor, which in Bisbee was composed of the barbers, butchers, painters, carpenters, electricians, blacksmiths, the stage hands, bootblacks and porters, retail clerks, bakers, printers.

The first strike called in Bisbee was on May 24, called by the Painters' Union. The

next strike called, the carpenters went out in sympathy with the painters about a week later. And the electricians went out in sympathy with the carpenters shortly after that.

When I went to the Machinists' meeting I went there to see what they were doing. It was my business as organizer for the American Federation of Labor to keep the American Federation organizations from the I. W. W.'s. The American Federation of Labor was not in sympathy with the I. W. W.'s. It was opposed to it.

Thos. J. Connor: Am clerk to Mr. Ghoring, Superintendent of the C. & A. Mines at Bisbee. A committee of miners called

on me on June 26 and handed me the following paper which I told them I would give to Mr. Ghoring. This was about 1:30 and they said they must have an answer by 5 that evening.

"Bisbee, Arizona, June 26, 1917. The undersigned committee has been appointed by Metal Mine Workers Industrial Union No. 800, Bisbee Branch, to present to the Mining Companies of the Warren District the following demands: First, the abolition of the physical examination. Second, two men to work machines. Third, two men to work together in all raises. Fourth, to discontinue all blasting during the shift. Fifth, the abolition of all bonus and contract work. Sixth, to abolish the sliding scale. All men under ground a minimum scale of \$6.00 per shift. Top men \$5.50. Seventh, no discrimination to be shown against members of any organization. Ben K. Webb, Chairman; M. C. Sullivan; W. H. Davis; J. G. Payne; A. S. Embree; Chas. Tannehill."

I gave the paper to Mr. Ghoring.

Mr. Curlee: I will read the following letters from the Chairman of the Press Committee of the Strikers:

"Bisbee, Arizona, June 26, 1917.

Grover H. Perry,
Phoenix, Arizona.

Fellow Worker:

Enclosed find demands made on the companies here today. Those demands were drawn up by the executive committee this morning and were presented to the three big companies about one o'clock.

Sherman, manager of the Copper Queen, refused to hear anything from the committee, tore up the typewritten copy of the demands we gave him and threw the pieces in the wastebasket. We were not able to find the management of the C. & A. Company, and left the demands with Ghoring's secretary, notifying him that if we did not hear from him by phone by five o'clock, we would consider they had refused the demands. Shattuck told us that he hoped he could settle differences with his own employees individually, but that he would have nothing to do with the I. W. W.

A special meeting of the branch was held in the hall at three o'clock at which the executive committee made their report. The meeting endorsed the action taken unanimously, and called a mass meeting to be held at the City Park for seven in the evening.

The mass meeting was a success beyond our best expectations. The speakers were all mud-diggers who got up at a minute's notice. It was the biggest crowd we have seen yet in the park, and they seemed to be pretty solid with us. We dwelt on the necessity of going while Butte was still on strike and while Globe and Miami were ready with their demands.

Pickets were appointed to take charge of each of the shafts

and urge the men to keep away from work. The way the bunch volunteered for picket work would make you feel good.

The executive committee is still on the job (two a. m.) and will be working until noon before we can see a chance of getting away for a rest. We have sent wires to the papers, to Haywood and all the branches we thought necessary.

Sherman went down in all the Queen shafts tonight and talked to the men. The work they are doing underground tonight is stalling and cleaning up and taking out the tools. Several shift bosses are coming out with us. The only pump-man working at the Shattuck is out. The engineers are not to be counted on but we think if we can get them to frame up demands for themselves, it will be possible to get most of them.

The Mexicans are almost a sure bet, as we are demanding a minimum of \$5.50 for all top men. Kimball got a hold of a good man for organizer among the Mexicans, and he is on the payroll.

Wednesday, 4 P. M.

The calling out of the day shift this morning was a great success. Many men were turned back on their way to the shafts by our pickets, and as each squad had a captain whose place it was to report the number of men who went to work at each shaft, it did not take us long to get a line on them. The total number normally reporting for work at each of the shafts is 2700. The number reported by our pickets as going on shift is about 840. This would leave just under 2000 men who decided to stay with us. We expect a still better percentage for the night shift as we have been drilling them all day and had a splendid mass meeting at one o'clock in the park, all the speakers mud-diggers.

Yours for revolution,

A. S. Embree,

Press Committee."

"Civilian Camp, Columbus, N. M., July 25, 1917.

Grover H. Perry,

Boyd Park Building,

Salt Lake City.

Fellow Worker:

By order of the executive committee I wrote to Haywood today, outlining the situation here and throughout Arizona.

I went into detail regarding your insistence that we include a six hour demand, showing that such action would injure Butte, as our strike was one more in sympathy with the Butte movement than for any demands for ourselves. Further, the raw material which in fact composed, and still composes, our main strength cannot grasp the six hour idea and regard it as a chimera. It will require the lesson of this strike and months of educational and organizational work afterwards to get them ready for the six hour struggle. It must become an ingrained part of themselves and

they must see the object and necessity for it as part of the whole revolutionary program before they will be ready to fight for it.

That is the crux of the whole situation. The majority of us do not yet regard this strike as part of a revolutionary movement but they do grasp the idea of industrial solidarity as they never could have done had it not been for this strike.

The spirit among us is undaunted. We consider the strike won, and we know we will get back to Bisbee in the near future where we can put the finishing touches on the struggle.

Yours for the solidarity strike,

A. S. Embree.

"Civilian Camp, Columbus, N. M., July 25, 1917.

William D. Haywood,
1001 West Madison Street,
Chicago.

Fellow Worker:

I have been instructed by our executive committee to write you and try to lay before you just what is our situation here.

We are sticking together here in as solid a bunch as I have ever known in the history of the labor movement. Out of 1145 men who were given their liberty to go where they pleased on July 21, not more than fifteen have drifted away, including five who have been sent on various missions by the executive committee. Even if we have to stay here two weeks longer, as long as the federal government is willing to feed us, I don't think we would lose more than another fifty or seventy-five in spite of the fact that many of the married men are greatly worried about their families.

Nevertheless there are other factors which are militating heavily against us. Time itself is one of the greatest. Remaining inactive is a fearfully hard task for even the best among us. It tends to cause criticism of their executive committee and gives the weak-kneed encouragement for the belief some of them already entertain, that the strike is lost and that it has resolved itself into an affair in which each of us will have to shift for himself and make the best of it.

Upon the outcome at Globe depends the fate of the I. W. W. throughout the entire State. There Moyer's union ably represented by Joe Cannon is still a live factor and one of great menace to us. We believe that the sooner the bosses come to a realization that they will have to come to terms with the strikers the sooner will Cannon have an opportunity to make his union solid through the check-off system, and by the same move put us on the toboggan slide. If such a move occurs while we are still stewing here at Columbus it will kill any chance we may have of winning our fight in Bisbee.

It therefore seems to us imperative that we make a move toward getting back to our homes before Cannon has a chance to frame up a game of that kind at Globe. We will have to abandon any

idea of the federal government taking any action in our favor until we actually force them to make some move. Those in authority here are doing everything they can in petty ways to force us out of the camp and scatter all over the country. Wires sent to President Wilson and Secretary of Labor Wilson bring no reply.

The only move we can figure out is to start back for our homes in the Warren district in one solid body. That may look easy from a distance, but I want to tell you it is a terrible undertaking. With the thermometer generally at 100 degrees in the shade through the day and far more in the sun, when you consider we have to march over a rough trail through a desert, ten to fifteen miles a day will be the limit unless we can commandeer a train, and there is very little hope of that on a railroad owned outright by Phelps-Dodge. The object of such an attempt would be to force the hand of the federal government and at the same time create a wave of sympathy towards our cause throughout the entire country. This would effectually offset the machinations of the Moyerites and those other A. F. L. harpies who, under the guise of friendship are merely marking time and awaiting the opportunity to knife us. It is useless to attempt such an undertaking without funds. We must provide stations along the entire route to which food and provisions can be shipped ahead. There must be almost perfect commissary arrangements, for it is not part of our plan to sacrifice our good human material. I believe that before we reach the Arizona state line the federal government would be forced by a wave of public sentiment throughout the United States to provide protection and transportation for the remainder of the journey.

This is why we have been pestering you for money during the last two days. We must have funds here at the Columbus State Bank to make this attempt. Not only will it be the means of winning the Bisbee strike but it is almost certain to put new life in every man on strike all through the industry and show the bosses that such indomitable spirit is not to be overcome. Our men here are absolutely to be depended upon for such an undertaking. They would welcome it, provided they can be shown they are not to be sent out on the desert as a wanton, useless sacrifice.

Bisbee went on strike because the membership there forced us to go out in sympathy with Butte more than for any idea of winning better conditions for ourselves.

A demand for a six-hour day would have been our greatest mistake in Arizona. Such a demand among the raw material we have would require a campaign of education and organization extending over a couple of years.

This is a solidarity strike and we must concentrate on that phase of it. The demands made are wholly secondary. Whether they are won as a whole or only in part is of minor importance. The fact that we stand together, man to man, one camp solid with the other, teaching the entire country the practical lesson of

industrial solidarity is the whole aim and object of this strike, and any demand which would tend to weaken the common sentiment of one toward the other would be a severe blow to the entire movement.

Our families in Bisbee, Lowel and other parts of the Warren District keep sending us reports that the relief handed out to the rank and file is inadequate. My wife and relatives of those who took any prominent part in the movement report that the very thugs and gunmen who drove us out are trying to square themselves by providing more than enough relief for them. But the Mexican families and Slavonian and those they consider of no importance are neglected. We must also have money to aid those.

Yours for the Solidarity Strike,

Embree."

April 3.

Harry C. Wheeler: Have been six years sheriff; until in 1918 I entered the army. The first I knew of trouble in the Warren District was through a telegram from A. S. Embree, asking me to indicate what stand I would take; they were about to call a strike in that district. I at once went to Bisbee and among the people to learn just what extent that trouble might cover. The first day or two I found a subdued state of excitement but nothing alarming. After the first couple of days reports began to come to me of various little disturbances, men would complain of their lunch-boxes being taken away from them while going to work. I began to get telephone messages from women that they had been visited by people who seemed to them to be of foreign extraction, threatening them with harm, many times dynamiting was the threat in case their husbands didn't cease work. When I reached these places I would ask the men, most of them foreigners, why they were at this time making this trouble, why they insisted in at-

tempting to prevent the government from getting a supply of the metal it needed. The invariable reply was that now the government is in trouble, now is the time to raise trouble in order to compel the government to take over these things. They told me that while they impeded industry in this district that their brethren in the north would likewise do the same to the lumber and wheat fields and to the cotton fields in the south.

I attended their meetings and heard their officers state that when they got \$6 a day and eight hours they would then demand \$8 and six hours, and after that \$10 and four hours work and that they would never make any agreement. That the red button was above the liberty bond; to hell with the draft and one of the I. W. W.'s told me that if he had a boy that was old enough to be subject to the draft he would ship him out of the country. The next thing I noticed was Mexicans daily marching in columns of two to the I. W. W. headquarters for provisions. Most of these people were strangers to me.

I went to a laundry and was told that the Mexican women were greatly frightened through threat of being dynamited if they didn't cease work as the laundry in Cripple Creek had been previously dynamited. It took most of my time the rest of that day calming the women and designating guards to protect them.

I sent a telegram to the Governor and President asking for help; I noticed the men who were at work would band together for protection and pass through the men who were congregated in front of the Post Office; they came in columns, squads, four abreast. I afterwards learned that that was the Loyalty League that had been formed. About that time the city marshal invited me to a meeting at the city hall between the I. W. W. committee, the mayor and himself. The mayor asked the committee to obey the city ordinances and to quit congregating in front of the post-office. He claimed it was a violation of the city ordinances—and to in future, before using the park, get a written permit which he said was a part of the city ordinances. Embree jumped to his feet and told the mayor and the city marshal that they would not longer tolerate their rights being trampled upon; that they would no longer be responsible for the actions of their men, and that he no long-

er could control them, and I replied to him that if he could not control them I could.

It was July 11, the day previous to the deportation. I had heard that these men were to go to what was called the "Change Rooms" to get their clothing—some of them who had been at work and had ceased; that they were to take advantage of that opportunity to close up the tunnels or mouths of the men who were working down in the mines. Reports came to me that many of the Mexicans were ex-Villista soldiers who know of caches of fire-arms and equipment in the Ajo mountains; that at the proper time they were going to take possession of these weapons, and I felt responsible as sheriff for the preservation of life and property. I made up my mind that I had to strike first or that a large element of that district would be struck. That night I received by telephone from the committee of the I. W. W. the following message: "If you or any of your deputies come around our headquarters you are going to meet with a hot reception." I gave the order for a meeting of captains of the various companies that I had aided to form, in that district for the night. And I published in the Bisbee Review on the morning of July 12 this proclamation:

"Bisbee, Arizona, July the 12th, 1917.—All women and children keep off the streets today. I have formed a sheriff's posse of 1200 men in Bisbee and a thousand in Douglas, all loyal Americans, for the purpose of arresting on charges of vagrancy, treason and of being disturbers of the peace of Cochise County, all those strange men who have congregated here from other parts and sec-

tions for the purpose of harrassing and intimidating all men who desire to pursue their daily toil. I am continually told of threats and insult heaped upon the working men of this District by so-called strikers who are strange to these parts, yet who presume to dictate the manner of life of the people of this District. Appeals to patriotism do not move them, nor do appeals to reason. At a time when our country needs her every resource, these strangers persist in keeping from her the precious metal production of this entire district. Today I heard threats to the effect that homes would be destroyed because the heads of families insisted upon their rights as Americans to work for themselves, their families and their country. Other threats have, and are being daily made. Men have been assaulted and brutally beaten, and only today I heard the Mayor of Bisbee threatened and his requests ignored. We cannot longer stand or tolerate such conditions. This is no labor trouble, we are sure of that, but a direct attempt to embarrass and injure the government of the United States. I therefore call upon all loyal Americans to aid me in peacefully arresting these disturbers of our national and local peace. Let no shot be fired throughout this day unless in necessary self-defense, and I hereby give warning that each and every leader of the so-called strike will be held personally responsible for any injury inflicted upon any of my deputies while in the performance of their duty, as deputies of my posse for whose acts I in turn assume full responsibility as sheriff of this county. All arrested persons will be treated humanely, and their cases examined with justice and care. I hope no resistance will be made for I desire no bloodshed. However, I am determined that if resistance is made it shall be quickly and effectively overcome. Harry C. Wheeler, Sheriff of Cochise County, Arizona."

I was given the following notice:

"Bisbee, Ariz., 7/10/17. Manager Orpheum Theater, Bisbee, Arizona. Sir: It has come to our notice that you have in your employ a boiler maker who is operating your moving-picture machine, who is working in the employ of the Copper Queen as a miner, as a strike breaker. If you do not remove him from your employ at once we will declare your theater unfair and advertise it throughout the Warren Dist.

"Yours,

"A. S. Embree."

Captain Wheeler was cross-examined at length by the State. He identified the following no-

tices published in the *Bisbee Review* of July 11, 1917:

"NOTICE. This is to notify all employees of the Copper Queen Company, except those laying off on account of sickness or accident, that if they report for work in their respective divisions

not later than the night shift Friday evening, July 13th, service records for pensions will stand, and physical examination will not be required. After that date all former employees will be subject to all the rules of the company governing the employment of new men. Men not working after that date will please remove clothes from our lockers. Phelps-Dodge Corporation (Copper Queen Branch), G. D. Dowell, Manager."

"NOTICE. Mine employees of the Shattuck-Arizona Copper Company are hereby notified that their jobs will be held open for them until Friday, July 13th, 1917. After July 13th, 1917, those who have not returned to work are discharged and must remove their personal effects from the company lockers within three (3) days. (Signed) Shattuck-Arizona Copper Company. L. C. Shattuck, Manager."

"NOTICE. This is to notify employees of the Calumet & Arizona Mining Company now laying off that, unless prevented by sickness or accident, they are requested to return to work on or before midnight of Friday, the 13th instant, and those men not returning on or before that time will be considered as new men and required to rustle jobs through the usual channel. Calumet & Arizona Mining Company."

It would have been impossible for me to have jailed all these disturbers; 150 was all our jail would hold, had I attempted it. Other men would have come in from all portions of the country until we had thousands of them here. They told me they were coming in all the time and I knew that the loyal men in Bisbee were departing on every train; we were growing weaker; they were growing stronger. Why did I send the men who were deported to Columbus, New Mexico? I wanted the troops to have them. I received no aid from the President or the Governor. The ball-park was the only place in which I could hold them for a time, but it was necessary in my honest opinion to get these men out of there within a short time or see many people on both sides killed or wounded. I was thinking of my country too, as well as of our District.

Invariably I asked them why they brought about trouble in war time when each man should sacrifice his interests to the interests of his country. I called to their mind that fact that these troubles were going on simultaneously all over the state in camps practically and that the attempt was undoubtedly pro-German and for the effect it would have upon the necessities needed by this government in time of war. Invariably the reply was, "Now is the time to raise trouble. Now is the time for us to get the things we wish. What does the government care for us?" That answer was almost invariably from some one of foreign extraction.

Mr. French: When did you learn of the law of Necessity?

In cases where I have read of buildings being dynamited to save other buildings, prairie fires and forest fires being set

in order to save lives. Those are laws of necessity although ordinarily they are against the law. It is the law of necessity that permits you to take the life of another man in self-defense. I didn't before that deportation wire or have wired messages to Tucson, Phoenix and all the cities around here to keep all the union workers on the run, that this was going to be pulled off or words to that effect. I know it would have been impossible for me to have sent any such message as that.

Why was I apprehensive of great crimes being committed? Because this time there were many times the number of men congregated there and this I. W. W. was constantly augmented and threatening to bring in other I. W. W. from other parts of the country, while in the other instance it was a local union that had gone on strike.

Mr. French: You had a standard of loyalty—all who didn't come up to that were disloyal? Any man that wouldn't sacrifice himself for his country at that time was not a loyal American. You acted on it in these deportations. It was a factor; the safety of that community was another factor. Then all working men who were called strikers at that time were disloyal according to that standard if through their striking they injured the interests of this country.

E. P. White: Was foreman in the Cooper Mine in 1917, was well acquainted with the miners in Bisbee. Should think eighty per cent of the men I would see on the street around about the time the strike was called

was strangers to me. In modern slang you would call them hard-boiled guys or rough-necks.

There was a picket line in front of the Copper Queen store and sometimes more would line up and the working men would have to go between them. Each one of them would have some slur as he passed along. They were all acting as pickets and trying to hinder other men from going to work. I heard a picket approach a man and say, "Say, fellow, ain't you coming out with us?" The fellow replied, "I have got a wife and two kids to take care of." The picket said, "we will take care of your kids and let the old woman get out among the boys and rustle." And this fellow got a little hot and it looked as though he was going to take it up and another fellow says "Oh let the G-damned scab go." I asked a man why they were to strike. He said the I. W. W.'s were going to get five dollars and a half a day for them. If this government wouldn't make them do it the German government would.

I came through the picket line coming off work. A picket walked up to me and says, "Say, fellow you have only got a day or two more. As an old friend of yours I advise you to stay home on the 13th because there's going to be hell popping in Bisbee. You are married and got a family. Look out for them." After that I didn't stop going to work, but I started to carry a lunch basket. I left a shot gun with my wife at home and told her if any strange men came up to that door that she didn't know to have the shot

gun sticking out of the door first.

J. A. Bendickson: Was a mine worker at Bisbee in 1917. During the strike, I walked through the picket line one morning, a man on both sides of me; one fellow came up and said to me, "I see you are hiding under old glory, you damn scab; that don't do you any good;" I kept going and never said a word to him.

Oscar Wynn: Have been a miner in Bisbee for five years; remember in talking to a fellow workman named Lutz, he said I am an I. W. W., that unions were no good; that the Germans would whip us all. After the strike the number of strangers in the city increased very much.

April 10.

William J. Jeffries: Was a miner in the Bisbee mines in 1917; was appointed a deputy under Captain Wheeler. The picketing strikers were very threatening; was several times told by them to leave the city quick.

Antonio Peralta: Was a miner in Bisbee in July, 1917; while going to work a crowd of unionists says if I am going to work and I told them yes, that I needed to work because I had a large family. They told me the union had sufficient money and food, that the men would not have to work and that the Copper Queen had large warehouses of provisions and other places there in Bisbee and from them they would have to take either for good or bad at the hour that it was necessary. Then when I came out from my work they commenced hol-

lering at me that I was an instrument of the capital, that I was bought by the company. They all wanted to beat me. And then the police came and placed me in jail, and they at the same time wanting to take me from the police. The following day I went to my work and about seven of them caught me, struck me a blow in the head and I fell. If I hadn't died in Bisbee it was because of the vigilance of the police. The strikers said that I should not be against them. I should not go on working, that the government was in war and was needing the copper and the company had no one to extract it for them, that the government has to insist on the company that they should pay five and a half on the outside and six on the inside, and if not the company would not have workmen and it would be the triumph of the Germans and of the workers of the world.

Jose Mata: Was a miner in Bisbee in July, 1917. The strikers would molest us every day with insults and hallooing at us to tell us that we should quit work, that if we continued working it would be bad for us. They formed themselves an escort to pick us off with stones, some with pistols. They would whistle at us or make fun of us, call us nicknames on the streets.

William Holmes: Was a miner at Bisbee in 1917; heard the strikers say that they were going to win, that it was a government of the rich and they thought it ought to be put on the bum and by God they were going to put it on the bum.

Heard the people in the town say "that it was a sure thing in their mind that the company could not concede to the demand of these people" from the fact that these men were moving up all the time on their demands and they believed if there was not something done that these fellows would destroy the homes and property of the community and walk out and leave them bare." That was the expression of the people that lived in Bisbee. From what I heard on the other side in restaurants and places around I would hear those fellows talking about it. They would say the working man hadn't had any say in the matter and that the working people were going to show them where to head in, they would show them where to butt in before the thing was through. My recollection from both sides was that something was liable to happen.

Philip A. Davis: Was a plumber in the Copper Queen mine; after the strike saw several bunches of strikers stopping men with pistols and guns from going to work.

William J. White, a mine foreman, gave similar evidence. So did *Charles A. Hines,* miner, *Charles Blair,* miner, *Mark Kentro,* miner.

Arthur Notman: Was assistant superintendent of the Copper Queen Mine in 1917, prior to the calling of the strike. We put all the men to work that we possibly could to get as much copper as we could. At the opening of the war in 1914 we had gone on a sliding scale of wages based on the selling price of copper. In May, 1917,

we were paying miners fifty, based on the selling price. In June the price having risen we were paying five-sixty. On the calling of the strike forty per cent went to work the day the strike was called and it fell off for the next two or three days. I was constantly approached by the men, saying they wouldn't be able to work unless they were afforded protection.

We were apprehensive because we all knew the reputation of the I. W. W. and their methods of conducting strikes; did what I could to relieve the apprehension of the men's minds, but there wasn't anything that I could really sincerely promise them in the way of protection. All I could urge them to do was to keep a stiff upper lip and stay with it just as we were all doing. There were numbers of men that I had never seen before in the district who were stationed on these picket lines and they were rough looking characters. Prior to the presentation of the demands of the strikers none of the old employees—sixty-five percent—men who had worked for us for two years or more, had ever spoken to me or anybody else in regard to conditions or entered any suggestion or complaint that conditions were not good.

I had no part in arranging the deportation. I suffered from the same apprehensions that everybody else did at that time over the possibility of some serious catastrophe brought about by the actions of these foreigners—not being foreigners in the sense of race necessarily but

men who were not employed in the district, who had come in there to cause trouble and who were members of the I. W. W. organization.

Mr. Burges: State whether or not you knew of any other way or believed there was any way to avert that danger except by what was done. I knew of no way.

Jack McRea, watchman: Heard men in the picket line say, "let's beat them up as we did at Globe. You have only a few days to work. We will take charge of it after that."

Frank Barnes, miner, gave similar evidence.

So did *Pedro Garcia,* miner.

P. L. Walton: In April, 1917, was in the Copper Queen Hospital. A man in the next bunk said he was an I. W. W. and that I had better join as there was going to be trouble, that they were going to blow up the hospitals and blow up the town if they didn't gain their point; they would burn everything in Bisbee. There would be nothing left.

April 5.

Stiles P. Jones: Am a miner but was employed during the strike to watch the strikers by the Loyalty League. Saw numbers of strangers that looked like miners come into town on every train, some wore I. W. W. buttons; saw them afterwards in the picket lines.

Charles Merrill gave similar evidence.

George Scott also testified to this effect.

James E. Brophy: Attended some of the miners' meetings

at the time of the strike; heard one speaker named Clark say that what they wanted was \$6.00 and eight hours of work, and that was not what they wanted; they wanted \$8.00 and six hours, and that was not what they wanted. They wanted the mines, they are ours, we made them. He advised them to get their red cards, that they were better than Liberty Bonds. The pickets were mostly strangers and foreigners. When the miners would go on and off shift they would grab hold of the men and take their lunch buckets away from them, grab them and kick them down the street.

Robert M. Thursby: Am a miner; did some work during the strike; had a wife and child and the crowd seemed pretty hostile; when I went to work they called me a stiff-legged son of a * * * and "we will get you yet."

W. C. Pope: Was a miner at Bisbee; was stopped a number of times going to work. One morning they got me by the coat, said I was not going to work. I pulled away and went to work. They said I hope the dirty son of a * * * gets buried up in the mine, not only me but a great many others. Later on a friend of mine said he would advise me not to be a damn fool any longer, to come out with the bunch, that in a few days there would be hell a-popping, that they were going to start something.

Samuel Ryle: Was a miner in the Warren District in 1917; Two mornings after the strike was called, going to work there was about forty of these men

stopped me and asked me to come out with them. I told them I couldn't see my way clear to come out, as I felt it my patriotic duty at such a time to work even if I was called to work for a dollar a day, it was no more of a sacrifice to me than it would be to the boys at the front. The morning following they stopped me again. I says, "Now I must be honest with you," I says, "I can't afford to come out with you fellows," I says, "I have got a wife and a little boy and a crippled brother, and a widowed mother to look after, and I have to work." And they told me, they says, "Well, if you don't come out with us, we will cripple you, too." I told them that I would look after that part of it all right. The third morning when they seen me coming, they shouted out to each other, "Well, here comes the cripple." I just gave them a smile and passed on, and I heard one of them passing call me a scab. That kind of aroused my temper and I says, "I am no scab and I am just doing my duty. I feel the flag of the country, and I have got to work if I am the only man traveling this road I must work." So it went on until the following week, we were ordered out on night shift, a bunch of us, to keep the thing running. I come down to the post-office and a bunch of them walked up to me and asked would I like to have my wife and child to be a widow and orphan. I told them, no sir, I wouldn't like to see them treated that way. They says, "They will be if you don't quit working." I

didn't say any more to them, but just went on to work. I afterwards took part in the deporting drive, because I thought it necessary for the safety of my wife and child.

W. C. Pope: Know Fred W. Brown; saw him several times on the picket line taking notes of the men that were going to work.

April 6.

John Rode: In July, 1917, was foreman of a mine at Griffith; the men were mostly Mexicans. One night I saw a crowd in a tent and went in, a Mexican was talking to them. He said, "I want all you people to go and join the union, the I. W. W. in Bisbee." He read some newspapers and it tells all over the United States is going to be strikes, New York, Chicago, Pennsylvania, Nebraska, and in Arizona at Jerome, Miami, Clifton, all over Arizona is going to have strikes and I want you to join the union and this I. W. W., and after he read the papers one of these Mexicans says, "he has been working two or three days and hasn't got no money, not enough money," and he said, "no matter about such business, I have got plenty of money. I give dollar to each single man to spend in town and have board and hotel and moving pictures." And another Mexican says what about people that have got families, and they said all right, and they said what names, and they commenced to give the names and put the names on paper and he give postcards and five Mexicans left the same night.

Frank Ashton: Was working in a Bisbee mine in 1917. The strikers would stop me quite often and try to get me to join them. They said see this crack? And I said "I do" and they said if you continue going up the hill we will throw you in it. Happened to have some thrift stamps with me and I took them out to see if they were all there and a man said "why don't you throw them away and get a red card, they are not any good. The red card will do you more good anywhere in the country."

Mrs. B. Butler: I kept a boarding house in the Warren District. During the strike a Finnish woman said that if I served any meals in the dining room to working men that I was going to get into trouble, and I said what trouble will I get into? and she said "We will burn you out or do something to you."

H. Goughlin: Two nights after the strike began, two men tackled me on the street. They said "you are still packing a bucket," and I said "yes" and they said "You had better pack a union card," and I said I wasn't in the union and was going to work and then one hit me in the breast. Had a piece of pipe up my sleeve and I hit him and knocked him out and the other fellow made a grab at me and I beat it home.

M. J. Cowan, Pete Gibrich, Romula Razuras, Benjamin Lopee, miners, gave similar evidence. They were all men who were forced to quit work on account of the threats of the strikers.

William Whitehead: Was working at a mine in the War-

ren District. Met a crowd in the street. One of them says "Don't you know that there is a strike on?" I said "yes, who called this strike in Bisbee?" They said, "We did." I says, "How many of you live in Bisbee?" There was none of them spoke. I says, "Do you know that if you had put this thing up to a vote of the people in Bisbee, working men, there wouldn't have been no strike?" They didn't say nothing. Then they asked me what I was going to do when they won. I says, "I don't know." "Well," they says, "we know, you are going out of town." "Well," I says, "I guess I have got enough money to go out of town if it comes to a case like that" and they said "yes you will go out of town in two days and you will probably wear a wooden suit when you go out." The man that was talking was a big German and another one a little black Irishman. So I saw Harry Wheeler and asked him for protection.

Lena Whitehead: My husband, the strikers didn't want him to go to work and they was threatening him all the time telling him if he did go to work they would kill him and all such stuff like that. I was scared to death.

S. K. Williams: Am an attorney and own several lodging houses in Bisbee. During the strike three men came to my house. They told me they were a committee representing the strikers and they came to tell me to run all the scabs that were lodging in my house out; said they would boycott my house if I didn't. I asked them

to consider it. All I owned in the world in the 30 years gathering was there, and one of the committee said would you like to see it in ashes?

Frank Salmon: Was in Bisbee in 1917 in July working on the streets and of nights when those trains came. There was quite a number of men on every train and walking in from Osborne I would see them every night, practically strangers; the increase of these men from time the strike was called up to the day of the deportation, would say was 75 percent. They looked to be a tough bunch to me. That is men who had not worked under ground. They were sun-burned, such as men who worked out. Men who work under ground have a lighter complexion and you can tell them.

Mrs. John Gondererson: Kept a rooming house in Bisbee. Strikers warned me not to rent any rooms to workers. They said the strikers would win out and if they did I would be put out of business, and they said there had been such a thing known as buildings being blown up.

Jesus Rochas: At a meeting in July, 1917, in Bisbee heard Dorene, the head of the Mexican strikers, say it didn't make any difference that the company had guns, munitions and rapid firearms on the hilltops, that they had dynamite, that the boys shouldn't be afraid, that they had dynamite.

William Jewell: A striker named Slim wanted me to join the I. W. W. He said we are going to call a strike all over the country. I says, "I hate to see a strike come with the coun-

try at war" and he said "I hear so much of this old country stuff around here" and he said "To hell with that. I would just as soon wipe my ass on the flag as I would on this piece of paper I have here" and I said "Well Slim if the country didn't satisfy me I would take the boat that brought me over and beat it back," and I said "You can't be a citizen and talk that way," and he said "I ain't a citizen and I ain't going to be one." He was a German.

April 7.

Isaac Jacobson: Roomed in Bisbee with a number of the strikers. When war was declared I always wore an American flag. Two or three times they made the remark to me, "When are you going to throw away that rag?" In the yard there were sitting on the bench a bunch of them. One of them made the remark, "I hope to see Germany whip them all." You could hear them for blocks applauding. One of the leaders took out a book and says, "I have here the name of the men that was working in the mine. Some of them I have a photograph of. Pictures of them." He says "not any of them will be able to work here or nowhere."

Pete Ivanovitch: Was a miner in Bisbee during the strike. A friend tell me not to go back to work as a bunch would come in the night time and kill me. When I go to work the strikers catch me at the depot and take my lunch bucket and call me names about a dozen times. I said "my wife is in the hospital. I got to work for the money,"

and they say "we have Austrian and German money." And I said "I don't need that money. I pay my bill."

James Johnson, George Walsh, Remi Lalonde, Mrs. Chas. Wilson, Nellie Hoy, or their husbands, testified that they were afraid to go to work and that the conditions made them fear for the safety of them and their families.

Helen S. Hall: Lived in Bisbee at the time. A full blooded German that was rooming at my house was out on strike. He showed me a roll of money. I says, "what is that for?" "To buy ammunition with." I says, "for what?" "We are going to burn up this town. We are going to blow up everything and if you have got any valuables you gather them up so that you can get them out at a moment's notice;" I says "you wouldn't do such a thing as that. Just think of the women and children." He says, "I don't care anything about that." And I says, "When are you going to do it?" He says "We are going to set the town afire on such a night" and that was the night after the deportation. He says, "We are going to win this business if we have to kill everybody in Bisbee." I says, "you know the government needs the copper and they need our assistance to help and do all we can." And he says, "To hell with you and your government." I was very angry and I had a paper in my hand rolled up and I slapped him in the face with it and I says, "Don't you never dare to talk about my government. I had two brothers that fought and bled for their country

and you can't say one word against my government. They would rise up in holy indignation if they thought I had assisted a traitor," and we had quite a little bit of trouble over over it and finally I says, "There is the gate and you get out of my yard. If you don't," I says, "I am liable to do something desperate." And he said he wouldn't; he was going to stay there. I told him he wouldn't, "if I have to get a gun. I can't have no such a man as that in my place and I wont." And I went into the house, and he went through the gate with his grip. That is the last I seen of him. But I knew they was intending to burn up the city.

April 9.

Fred A. McKinney: In summer of 1917 was newspaper man in Bisbee. Knew most of the leaders; attended their meetings and talked with numbers of the men during the strike; went to the meeting at which the strike was called; saw that the large majority of the crowd were strangers. Heard Maddock, one of the leaders, and who spoke several times, say, "Our photographer is getting the pictures of the men as they come off shift. Everybody who is working—all men who are working are marked men. When we win the strike and get the jobs, those fellows will get theirs. They will get what is coming to them, these men, these scabs, these marked men."

Heard it said that when this strike is won for eight hours and six dollars, then we will strike again for six hours and

eight dollars, and so on until we finally get the mines. One or two of the speakers said this thing must be kept up until the mine owners had to give up the mines, until they were no longer profitable.

At the City Hall Park Mad-dock said, "The capitalists and their hired press are after you. They are hounding to buy Liberty Bonds." He pulled out of his vest pocket his red card and says, "This is the only Liberty Bond that will do you any good, this little red card." He says, "Wall Street brought this war on, and they are trying to make you pay for it buying Liberty Bonds. When you working men, when you quit shouldering a rifle and marching away to kill your brother worker there will be no more war. The

rich men don't shoulder rifles, it is you poor stiff that do."

John E. Skinner: During the strike I was living with my family at Gleason about 27 miles from Bisbee. Shortly after the deportation, six men came to my ranch; two of them appeared to be Americans and the other four were foreigners; they were armed; they stated that they were participants in the trouble going on in Bisbee; that they had escaped from the drive; that their purpose was to destroy the camp with dynamite, and that if they had not been beaten to it by one day they would have done so.

All the witnesses for the defense were cross-examined at great length by the State, many days being consumed in hearing their testimony.

April 20

THE COURT: I have excluded both documentary and oral evidence to prove a general conspiracy as set out in the offer of proof. The question now arises whether as showing the conditions at Bisbee, the character of the I. W. W. organization, as set out in their Constitution and literature may be proved. Now it strikes me that when a condition of violence and terrorism is charged to exist, that the character of those charged with causing that situation is a legitimate and proper thing to be shown in determining whether or not that situation actually existed. When men are asserted to have been violent, to have caused a situation of violence, you may properly inquire what manner of men it was who are charged with so doing, that the character of the organization may be shown, not as warranting the extreme and summary remedy adopted, but as a circumstance on the same plane, so far as the legal effect is concerned, as the physical appearance of the parties involved. It is simply the question, what kind of people were there, and is governed by the same rule that would permit a showing that they were strangers; that they were short men or tall men, or had this or that appearance. The same principle warrants the introduction of evidence as to what the organization was that they claimed to have been apprehensive of. There is evidence tending to show that the strike was called by a certain organization, that it was conducted by that certain organization,

perhaps in large part. So I rule that the defense may show by oral or documentary evidence the character of this organization.

The *Defense* thereupon (after calling witnesses, printers and others to show that the writings had been printed and published by the I. W. W. or at their order) read many of their pamphlets, books, circulars and other literature. (The following extracts will show the character of these writings.)

The Constitution of the I. W. W. (Preamble)

The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people and the few, who make up the employing class, have all the good things of life.

Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

We find that the centering of the management of industries into fewer and fewer hands makes the trade-unions unable to cope with the ever growing power of the employing class. The trade-unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade-unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

The conditions can be changed and the interest of the working class upheld only by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all.

Instead of the conservative motto, "A fair day's wages for a fair day's work" we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system."

It is the historic mission of the working class to do away with capitalism. The army of production must be organized, not only for the every day struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old.

Knowing, therefore, that such an organization is absolutely necessary for our emancipation, we unite under the following constitution:

The I. W. W. Its History, Structure and Methods (Vincent St. John.)

In the fall of 1904 six active workers in the revolutionary labor movement held a conference. They issued a call for a larger gather-

ing. The six were Isaac Cowen, American representative of the Amalgamated Society of Engineers of Great Britain, Clarence Smith, general secretary-treasurer of the American Labor Union, Thomas J. Hagerty, editor of the "Voice of Labor," official organ of the A. L. U., George Estes, president of the United Brotherhood of Railway Employes, W. L. Hall, general secretary-treasurer U. B. R. E., and Wm. E. Trautman, editor of the "Brauer Zeitung," the official organ of the United Brewery Workers of America.

The conference met with thirty present, and drew up the Industrial Union Manifesto calling for a convention to be held in Chicago, June 27, 1905, for the purpose of launching an organization in accord with the principles set forth in the Manifesto.

One hundred and eighty-six delegates met at Chicago from 34 states, representing 90,000 members, and adopted the I. W. W. Constitution.

All kinds of theories were represented among the delegates present at the first convention. The principal ones were four: Parliamentary socialists—two types—nihilist and opportunist, Marxian and reformist; anarchist; industrial unionist; and labor union fakir.

The first year of the organization was one of internal struggle for control by these different elements. The two camps of socialist politicians looked upon the I. W. W. only as a battle ground upon which to settle their respective merits and demerits. The labor fakirs strove to fasten themselves upon the organization that they might continue to exist if the new union was a success. The anarchist element did not interfere to any great extent in the internal affairs. In spite of these and other obstacles the new organization made progress; fought successful battles with the employing class, and started a monthly organ, "The Industrial Worker." Also issued the first call for the defense of Moyer, Haywood and Pettibone under the title "Shall our Brothers Be Murdered?" and formed the defense league. Finally at the fourth convention, the rupture between the socialists and the union workers and the revolutionary workers became complete and ended with the latter getting absolute control, which they still enjoy.

The I. W. W. holds that, regardless of the bravery and spirit the workers may show, if they are compelled to fight with old methods, and an out of date form of organization against the modern organization of the employing class, there can be but one outcome to any struggle waged under those conditions—defeat. It recognizes the need of working class solidarity. To achieve this it proposes the recognition of the Class Struggle as the basic principle of the organization, and declares its purpose to be the fighting of that struggle, until the working class is in control of the administration of industry.

As a revolutionary organization the I. W. W. uses any tactics that will get the results sought solely by the power of the organization to make good. The question of "right" or "wrong" does not concern us.

No terms made with an employer are final. All peace so long as the wage system lasts, is but an armed truce. We seek no agreements with employers.

Failing to force concessions from the employers by the strike, work is resumed and "sabotage" is used to force the employers to concede the demands of the workers.

The great progress made in machine production results in an ever increasing army of unemployed. To counteract this the I. W. W. aims to establish the shorter work day, and to slow up the working pace, thus compelling the employment of more and more workers. (The writer names the large number of strikes ordered by the I. W. W.)

During strikes the works are closely picketed and every effort made to keep the employers from getting workers into the shops. All supplies are cut off. All shipments are fused or missent, delayed and lost if possible. Strike breakers are isolated. Interference by the Government is resented by open violation of the Government's orders. Going to jail *en masse*, causing expense to the taxpayers—which is but another name for the employing class. The organization has fourteen publications of its own, twelve weekly and two bi-weekly, in the following languages: English 3, and one each in French, Italian, Spanish, Portuguese, Russian, Polish, Slavish, Lithuanian, Hungarian, Swedish and Jewish. A Spanish weekly and an Italian weekly are affiliated. One Russian weekly and an English monthly and a Finnish daily. The membership today, about 300,000, consists very largely of unskilled workers, is in the following industries: Textile, Steel, Lumber, Mining, Farming, Railroad Construction and Marine Transportation.

The future belongs to the I. W. W. The day of the skilled worker is past. Machine production has made the unskilled worker the main factor in industry. The workers can no longer act in small groups with any chance of success. They must organize and work as a class.

We are looking forward to the time when the organized Proletariat will meet in their Union the world over and decide how long they will work and how much of the wealth they produce they will give to the Boss.

"Patriotism and the Worker." By Gustave Herve, I. W. W. Publishing Bureau, Chicago." Introduction.

In issuing this well known speech of Gustave Herve's as one of the publications of our Bureau we are contributing to an agitation that is now universal in the Capitalists' world, and is of prime importance as well in the United States as in France. Here, as in France, the child's brain is stuffed with stories of alleged "heroes" of American History from George Washington to Theodore Roosevelt as a preparatory schooling for the future slave to acquire the necessary respect for and obedience to his master—whose master-

ship, in America as in Europe has resulted from fraud, cunning, financial manipulation, land steals, and by fishing in troubled waters during and after waters of conquest or of expansion, as well as through the merciless exploitation of the working class in industry.

The Industrial Workers of the World aims to unite all wage workers, without distinction of race, nationality, sex or any other consideration except that they are exploited by a master, into One Big Union of the Working Class, "To take possession of the earth and the machinery of production and abolish the wage system," thus putting an end forever to the rule of the robber class.

The General Strike. By William D. Haywood; also, *The Last War*, by B. B., I. W. W. Pub. Bureau, Chicago.

The working class can't lose anything. While the capitalist class have got all the money and all the credit, still if the working class laid off the capitalists couldn't get food at any price. All the workers have to do is to organize so that they can put their hands in their pockets; when they have got their hands there, the capitalists can't get theirs in. If the workers can organize so that they can stand idle they will then be strong enough so that they can take the factories. I hope to see the day when the man who goes out of the factory will be the one who will be called a scab; when the good union man will stay in the factory, whether the capitalists like it or not; when we lock the bosses out and run the factories to suit ourselves. That is our program. We will do it.

Europe is strewn with ruins of towns and villages, and thousands of corpses, and all this destruction has been brought about by the scientifically conceived instruments, carefully prepared for that sole purpose during many years of labor. These politicians have the boldness to think and plan on a scale that we workers may well envy. But it is the workers who build and man their ships, their guns; and who manufacture their explosives and the whole of the engines of war. It is they who lead dreary lives to make these marvels of destruction possible. It is the working men who submit themselves in their thousands to be blown to pieces by these weapons, it is they who bear the poverty that follows in the wake of war—and all the time the rich grow richer and in the work houses our veterans weep with joy in reading of our glory!

Rich are the palaces the workers can build and furnish with the utmost wealth, but should they attempt to enter them they will meet the bludgeon which they have made for the policeman, and be conducted to the prison they have so substantially built, and locked in by the lock they so carefully constructed.

It is war we proclaim, the last war, the international war in which the workers of all lands shall be united against the invaders—the rich who have seized the land and lived on the labor of the poor. This is the war that remains yet to be fought, it is inevitable. It may be delayed but it cannot be prevented.

*I. W. W. Songs to Fan the Flames of Discontent—
I. W. W. Pub. Bureau, Chicago, Ill.*

WORKERS OF THE WORLD ANTHEM.

By Joe Hill.

If the workers take a notion
They can stop all speeding trains,
Every ship upon the ocean
They can tie with mighty chains.
Every wheel in the creation,
Every mine and every mill,
Fleets and armies of the nation,
Will at their command stand still.

Join the union, fellow workers,
Men and women, side by side;
We will crush the greedy shirkers
Like a sweeping, surging tide;
For united we are standing,
But divided we will fall;
Let this be our understanding—
"All for one and one for all."

Workers of the world, awaken!
Rise in all your splendid might;
Take the wealth that you are making,
It belongs to you by right.
No one will for bread be crying,
We'll have freedom, love and health,
When the grand red flag is flying
In the Workers' Commonwealth.

THE BANNER OF LABOR.

(Tune: "The Star Spangled Banner.")

Oh, say, can you hear, coming near and more near,
The call now resounding: "Come all ye who labor?"
The Industrial band, throughout all the land,
Bid toilers, remember each toiler his neighbor.
Come, workers, unite! 'tis Humanity's fight.
We all, you come forth in your manhood and might.

Chorus:

And the BANNER OF LABOR will surely soon wave
O'er the land that is free from the master and slave.
And the BANNER OF LABOR will surely soon wave
O'er the land that is free from the master and slave.

The blood and the lives of children and wives
 Are ground into dollars for parasites' pleasure;
 The children now slave, till they sink in their grave—
 That Robbers may fatten and add to their treasure.
 Will you idly sit by, unheeding their cry?
 Arise! Be ye men! See, the battle drawn nigh!

THE WORKERS' MARSEILLAISE.

Ye sons of toil, awake to glory!
 Hark, hark, what myriads bid you rise;
 Your children, wives and grandsires hoary—
 Behold their tears and hear their cries!
 Behold their tears and hear their cries!
 Shall hateful tyrants mischief breeding,
 With hireling hosts, a ruffian band—
 Affright and desolate the land,
 While peace and liberty lie bleeding?

Chorus:

To arms! to arms! ye brave!
 Th' avenging sword unsheathe!
 March on, March on, all hearts resolved
 To Victory or Death.

HARVEST WAR SONG.

By Pat Brennan.

(Tune: "Tipperary.")

We are coming home, John Farmer; we are coming back to stay.
 For nigh on fifty years or more, we've gathered up your hay.
 We have slept out in your hayfields, we have heard your morning
 shout;
 We've heard you wondering where in hell's them pesky go-about's?

Chorus:

It's a long way, now understand me; it's a long way to town;
 It's a long way across the prairie, and to hell with Farmer John.
 Up goes machine or wages, and the hours must come down;
 For we're out for a winter's stake this summer, and we want no
 scabs around.

You've paid the going wages, that's what kept us on the bum,
 You say you've done your duty, you chin-whiskered son of a gun,
 We have sent your kids to college, but still you must rave and
 shout,
 And call us tramps and hoboos, and pesky go-about's.

But now the wintry breezes are a-shaking our poor frames,
 And the long drawn days of hunger try to drive us boes insane.
 It is driving us to action—we are organized today;
 Us pesky tramps and hoboos are coming back to stay.

THE PREACHER AND THE SLAVE.

By Joe Hill.

(Tune: "Sweet Bye and Bye.")

Long-haired preachers come out every night,
Try to tell you what's wrong and what's right;
But when asked how 'bout something to eat
They will answer with voices so sweet:

Chorus:

You will eat, bye and bye,
In that glorious land above the sky;
Work and pray, live on hay,
You'll get pie in the sky when you die.

And the starvation army they play,
And they sing and they clap and they pray.
Till they get all your coin on the drum,
Then they'll tell you when you're on the bum:

Chorus:

You will eat, bye and bye,
When you've learned how to cook and to fry;
Chop some wood, 'twill do you good,
And you'll eat in the sweet bye and bye.

THE NINETY AND NINE.

By Rose Elizabeth Smith.

(Tune: "Ninety and Nine.")

There are ninety and nine that work and die,
In the hunger and want and cold,
That one may revel in luxury,
And be lapped in the silken fold.
And ninety and nine in their hovels bare,
And one in a palace of riches rare.

From the sweat of their brow the desert blooms
And the forest before them falls;
Their labor has builded humble homes,
And cities with lofty halls;
And the one owns cities and houses and lands
And the ninety and nine have empty hands.

But the night so dreary and dark and long,
At last shall the morning bring;
And over the land the victor's song
Of the ninety and nine shall ring,
And echo afar, from zone to zone,
"Rejoice! for Labor shall have its own."

CHRISTIANS AT WAR.

By John F. Kendrick.

(Tune: "Onward, Christian Soldiers.")

Onward, Christian Soldiers! Duty's way is plain:
 Slay your Christian neighbors, or by them be slain.
 Pulpiteers are spouting effervescent swill,
 God above is calling you to rob and rape and kill.
 All your acts are sanctified by the Lamb on high:
 If you love the Holy Ghost, go murder, pray and die.

Onward, Christian soldiers! Rip and tear and smite!
 Let the gentle Jesus bless your dynamite.
 Splinter skulls with shrapnel, fertilize the sod;
 Folks who do not speak your tongue, deserve the curse of God.
 Smash the doors of every home, pretty maidens seize;
 Use your might and sacred right to treat them as you please.

Onward, Christian soldiers! Eat and drink your fill;
 Rob with bloody fingers, Christ O. K.'s the bill.
 Steal the farmer's savings, take their grain and meat;
 Even though the children starve, the Savior's bums must eat.
 Burn the peasant's cottages, orphans leave bereft;
 In Jehovah's holy name, wreak ruin right and left.

Onward, Christian soldiers! Drench the land with gore;
 Mercy is a weakness all the gods abhor.
 Bayonet the babies, jab the mothers, too;
 Hoist the cross of Calvary to hallow all you do.
 File your bullets' noses flat, poison every well;
 God decrees your enemies must all go plumb to hell.

Onward, Christian soldiers! blighting all you meet,
 Trampling human freedom under pious feet.
 Praise the Lord whose dollar sign dupes his favored race!
 Make the foreign trash respect your bullion brand of grace;
 Trust in mock salvation, serve as pirates' tools;
 History will say of you: "That pack of G—— d—— fools."

PAINT 'ER RED.

By Ralph H. Chaplin.

(Tune: "Marching Through Georgia.")

Come with us, you workingmen, and join the rebel band;
 Come you discontented ones, and give a helping hand;
 We march against the parasite to drive him from the land,
 With ONE BIG INDUSTRIAL UNION.

Chorus:

Hurrah, Hurrah, we're going to paint 'er red.
 Hurrah, Hurrah, the way is clear ahead—
 We're gaining shop democracy and liberty and bread
 With ONE BIG INDUSTRIAL UNION.

In factory and field and mine we gather in our might,
 We're on the job and know the way to win the hardest fight,
 For the beacon that shall guide us out of darkness into light,
 IS ONE BIG INDUSTRIAL UNION.

Come on, you fellows, get in line; we'll fill the boss with fears,
 Red's the color of our flag, it's stained with blood and tears—
 We'll flout it in his ugly mug and ring our loudest cheers
 For ONE BIG INDUSTRIAL UNION.

"Slaves" they call us "working plugs," inferior by birth,
 But when we hit their pocketbooks we'll spoil their smiles of
 mirth,
 We'll stop their dirty dividends and drive them from the earth
 With ONE BIG INDUSTRIAL UNION.

We hate their rotten system more than any mortals do,
 Our aim is not to patch it up, but build it all anew,
 And what we'll have for government, when finally we're through
 is ONE BIG INDUSTRIAL UNION.

Proletarian and Petit Bourgeois. Austin Lewis. I. W. W. Pub. Bureau, Chicago.

The Petit Bourgeois are the small capitalists, shopkeepers, manufacturers and farmers who form the backbone of our present system. They are being crushed by the Big Capitalist, and have been driven to work for a salary for him.

The small fish swallowed is transformed into a part of the shark, and the petit-bourgeois losing his economic identity is absorbed in the Nirvana of the greater capitalism. He does not count. The defeated small tradesman either sinks into oblivion, buried in the slums, the cemeteries of the unfit, or perambulates the earth an uneasy ghost entirely out of place in society and tampering with reactionary politics, in the ranks of the Roosevelt pseudo progressives, or playing with the Socialist Party.

What is a proletarian? He is one who has nothing but his labor power to sell, and whose labor power is incapable of being turned into property. Skilled labor is being qualitatively reduced to terms of unskilled labor. The crafts are tottering and the future of the proletariat is no longer in the hands of the aristocracy of labor but is being transformed at an ever increasing speed into those of the common labor masses.

Individual skill, which is the fundamental underlying base of the craft and upon which the craftsman relies for his superiority

over unskilled labor, is being rapidly obliterated. Standardization and the control of technical processes which become more and more perfect with the increasing knowledge of scientific laws and mechanics fling the craftsman in ever increasing numbers upon the scrap heap and confiscate his precious possession, his particular little piece of property.

The present system which is the great confiscator of property and which in the name of preserving property rights destroys all inferior property rights, has him in its clutch and he has to go the way of the small bourgeois. He cannot save himself.

The proletariat, which is just entering the ring as a contestant for the mastery of the modern world, comes equipped with the knowledge that its victories are not to be won by the babblings of public men and the intrigues of political place-hunters, but by stern conflict on the industrial field and by ceaseless and relentless war upon those whom it must expropriate."

*"Sabotage, Its History, Philosophy and Function,
by Walker C. Smith."*

Three versions are given of the source of the word. The one best known is that a striking French weaver cast his wooden shoe—called a sabot—into the delicate mechanism of the loom upon leaving the mill. The confusion that resulted, acting to the worker's benefit, brought to the front a line of tactics that took the name of SABOTAGE. Slow work is also said to be at the basis of the word, the idea being that wooden shoes are clumsy and so prevent quick action on the part of the workers. The third idea is that Sabotage is coined from the slang term that means "putting the boots" to the employers by striking directly at their profits without leaving the job.

Sabotage is the destruction of profits to gain a definite, revolutionary, economic end. It has many forms. It may mean the destroying of raw materials destined for a scab factory or shop or the spoiling of a finished product, or the destruction of parts of machinery or the disarrangement of a whole machine where that machine is the one upon which the other machines are dependent for material. It may mean working slow, or poor work, or missending packages, giving overweight to customers, pointing out defects in goods, using the best of materials where the employer desires adulteration, and the telling of trade secrets.

Sabotage is a direct application of the idea that property has no rights that its creators are bound to respect. Especially is this true when the creators of the wealth of the world are in hunger and want amid the abundance they have produced, while the idle few have all the good things of life.

The charge that sabotage is "immoral," "unethical," "uncivilized," and the like, does not worry the rebellious workers so long as it is effective in flinging injury to the employer's profits. The question is not, "Is sabotage immoral?" but, "Does sabotage get the goods?" The press is one of the greatest agencies used by the

employers to keep the workers in subjection. It is dominated by the industrial masters. Sabotage is the most effective weapon for the stopping of newspaper attacks upon the workers and their organization.

The linotype operator can misplace a portion of the copy. The proof reader can insert or remove the word "not" and thus change a knock to a boost. The make-up man can place another article where it was intended the lie should go or he can even insert a part of another article under the offending heading so that it will apparently read correctly and yet will not contain the harmful material. The stereotyper can damage the face of the offending article so that it will not print.

In a theatre strike we have only to drop some vile smelling chemicals upon the floor during the performance and then make a quiet and speedy exit. The audience will follow within a short time.

"Open mouth" sabotage is another form. Commerce today is founded on fraud. Capitalism's standard of honesty demands that the wage slave lie to everyone except his employer.

In the foodstuffs industry open mouth sabotage is peculiarly potent. Let the workers expose the method of manufacture and the boss will soon come to terms. Let the workers in the candy factories tell of the glucose, terra alba and other poisonous substances in the candies. Let the cooks tell how food is prepared for the table, of how foul meats are treated with chemicals so they may be served; let the dishwashers, waiters and other hotel and restaurant workers tell of the conditions under which dishes are "washed" and the orders "prepared." Let the building workers make known the substitution that invariably takes place in erecting structures by contract.

Let the firemen spread the news of boilers in which steam is generated to a dangerous point in order to save expenses.

The factory workers can tell of goods piled up beyond the fire limit. The workers in the building of bridges, dams, reservoirs and structures of a similar nature, can tell of inferior materials used therein and of methods of construction not according to specifications, oftentimes being the direct cause of many deaths. Workers on the railroads can tell of faulty engines, unsafe trestles. Marine transport workers would do well to tell of the insufficient number of lifeboats, of inferior belts, and so forth. The textile worker can tell of the shoddy which is sold as "wool."

Sabotage, by Emile Pouget. Translated from the French, with an introduction by Arturo M. Giovannitti. Chicago.

The first form of sabotage consists in simply "going slow" or "taking it easy."

The bricklayers who are being paid less than they demand and are laying 1400 bricks a day will now lay only 1000. If the boss notices it, lay the usual number of bricks, but see that the mortar does not stick, so that the top part of the wall will have to be

made over again in the morning; or else after laying the real number of bricks you are actually paid for, build up the rest out of the plumb line or use broken bricks or recur to any of the many tricks of the trade.

The same in other trades. Sweatshop girls when their wages are reduced, instead of sewing one hundred pairs of pants, can sew seventy; or, if they must return the same number, sew the other thirty imperfectly—with crooked seams or use bad thread or doctor the thread with cheap chemicals so that the seams rip a few hours after the sewing, or be not so careful about the oil on the machines and so on.

Now that the bosses have succeeded in dealing an almost mortal blow to the boycott, now that picket duty is practically outlawed, free speech throttled, free assemblage prohibited and injunctions against labor are becoming epidemic, Sabotage, this dark, invincible, terrible Damocles' Sword that hangs over the head of the master class, will replace all the confiscated weapons and ammunition of the army of the toilers. And it will win, for it is the most redoubtable of all, except the general strike. In vain may the bosses get an injunction against the strikers' funds—Sabotage will get a more powerful one against their machinery. In vain may they invoke old laws and make new ones against it—they will never discover it, never track it to its lair, never run it to the ground, for no laws will ever make a crime of the "clumsiness and lack of skill" of a "scab" who bungles his work or "puts on the bum" a machine he "does not know how to run."

There can be no injunction against it. No policeman's club. No rifle diet. No prison bars. It cannot be starved into submission. It cannot be discharged. It cannot be blacklisted. It is present everywhere and everywhere invisible, like the airship that soars high above the clouds in the dead of night, beyond the reach of the cannon and the searchlight, and drops the deadliest bombs into the enemy's own encampment.

Sabotage is the most formidable weapon of economic warfare, which will eventually open to the workers the great Iron gate of capitalist exploitation and lead them out of the house of bondage into the free land of the future.

The Revolutionary I. W. W. By Grover H. Perry. I. W. W. Pub. Bureau. Chicago.

The Industrial Workers of the World are laying the foundation of a new government. This government will have for its legislative halls the mills, the workshops and factories. Its legislators will be the men in the mills, shops and factories. Its legislative enactments will be those pertaining to the welfare of the workers.

These things are to be. No force can stop them. Armies will be of no avail. Capitalist governments may issue their mandates in vain. The power of the workers—industrially organized—is the only power on earth worth considering—once they realize that power. Classes will disappear, and in their place will be only useful members of society—the workers.

Every worker should have an ambition to live to be a healthy old man or woman and hear the whistle blow for the bosses to go to work.

The Solidarity. (Issued by I. W. W.)

Because the capitalist class of America saw fit to plunge the nation into one of the most hopeless and idiotic wars in history is no reason why the workers should neglect to "Hold all they've got and get all they can." The slaves had a war on their hands before the Oligarchs started their's—and the workers' war is of far more importance. And this greatest and holiest of struggles will continue during the "War" and after it is over "Until the workers organize as a class, take possession of the earth and the machinery of production, and abolish the wage system." The Revolutionary Workers of Russia have started out to do this very thing and that is why the Russian revolution has become the nightmare of the Industrial as well as political tyranny the world over.

Capitalism is a hydra with many heads. War is but one of them; governmental repression is but one of them; religion is one of them, and the prostituted press one of them. If the working class had the power to cut off any one of these heads it would have the power to kill the monster outright. It is the historic mission of the working class to do away with the Beast, for there is no longer room on the earth for both Capitalism and the producing class.

Sabotage is a weapon of industrial warfare, it is one form of striking; and, like any other method of striking, is primarily intended to "hit the boss in the pocketbook." Sabotage is just as necessary to the wage-slave of today as were the bow and arrow to his prehistoric forbear. In seeking to "outlaw" sabotage, the legislators of the Western states are attempting to place human necessity outside of the law. But "necessity knows no law." They can just about as easily stop sabotage with legislation as a medicine-man could stop a tornado with a tom-tom.

April 15.

hope somebody kill you, if nobody else does I will."

Vincent Ogwiek: Was a miner at Bisbee during the strike. Bill Koza, an I. W. W., was working nights and I was working days, and he was my room partner, and he wake me up at 1:30 in the morning, told me if I knowed the strike was called. I said, "no." He said, "Well, the strike is on." He asked me if I am going to work in the morning. I said, "I certainly will." Why, then, he kind of get mean. He said, "Well, if you do why I

Paul Lamenson: Was a deputy sheriff during the strike; was employed to escort the miners to and from their work. They cursed me, threatened me with knocking my white head off and used abusive language at all times. Told one another that I was in business on Main street; that I could not afford to do it, that I would probably be one of them that would suffer the greatest because of the fact that they anticipated blowing it up.

The wife of Bert Long, Secretary of the I. W. W., said I was a damn fool for sticking up for the rest of the bunch; that it was just as well for me to go a little slow; said they were prepared to defend themselves, take guns at any time, that they had 500 to 1500 guns and ammunition in the I. W. W. headquarters.

H. E. Wootton: Am the defendant here. Have lived 8½ years in Bisbee in the Hardware and Plumbing business. The strike was very sudden. The miners didn't know what the strike was called for from what I could understand; it progressed; the men seemed to be discovering that the miners didn't want the strike and that some of them were going back to work and that seemed to cause the leaders and the radical element to get more bitter and more threatening all of the time, together with the strangers who were entering the town for the purpose of promoting the strike. It kept getting worse until the last few days just before the drive it was almost positive that there was going to be trouble there, everybody's viewpoint. The picket would call the men going to and from work all kinds of names and snatch their lunch buckets away from them. They would make a circle around a man as he was going to work, hold him there closed in the circle until he was froze out and went home. The only way he could go was in the direction of his home. The last few days they were threatening to blow up everything.

An I. W. W. named Phillips told me they were going to win

the strike, and when they did win it they were going to clean up the town, every man that worked would be beaten up and chased out, and the merchants that supported the mines would also be put out of business, burned up and dynamited. If they couldn't win by their own efforts in Bisbee they would win by bringing in all of the harvest hands from the fields in Kansas; they would burn up the wheat stacks in the fields and they would win and they would do this not only in Bisbee but the whole country would be burned to compel it, for them to win.

Mr. Burges: State whether on the 12th of July, 1917, the morning of the 12th of July, the night of the 11th and the morning of the 12th the people of that town and the property of that town situated within the Warren District were in danger of destruction from any source?

I did believe it. I had been told so often that I couldn't help but believe it.

Who did you believe was going to undertake that?

The I. W. W. and the striking people, the people promoting the labor disturbance.

Were you in fear of great injury to your family?

I was.

What was it that caused you on the evening of the 11th, the night of the 11th and the morning of the 12th of July, 1917, to participate in what is called the deportation from Bisbee?

From what I heard from so many people and the action that was taking place against me I knew that they meant business. It was a case of some way to

beat them to it or we would be put out of the way. They claimed they were going to put us out of the way and there was no question about it, it was a question of whether it was but a few days or a few hours and it was a case of somebody acting and when the Sheriff called on the people to assist him in handling the situation and getting

it in hand, I took part and helped out.

Mr. Wootton was cross-examined at length by the State.

April 17-26.

A number of witnesses already examined were recalled by the State in rebuttal on the questions of the circumstances of the deportation and the acts of individuals.

April 28.

THE CHARGE TO THE JURY.^s

JUDGE PATTEE. Gentlemen of the Jury: The defendant, H. E. Wootton, is charged by the information filed in this case with the crime of kidnaping. The information charges in substance that within the County of Cochise and State of Arizona, on the 12th day of July, 1917, the defendant Wootton did forcibly take and arrest one Fred W. Brown and forcibly convey him from the County of Cochise and State of Arizona into the State of New Mexico without having established a claim to him according to the laws of the United States and the State of Arizona. The statute under which this indictment is framed and under which this case is prosecuted is Section 185 of the Penal Code of the State of Arizona, which reads as follows:

"Every person who forcibly steals, takes or arrests any person in this state and carries him into another country, state or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim according to the laws of the United States or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like any person to go out of this state, or to be taken or removed therefrom for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person, and every person who, being out of this state, abducts, or takes by force or fraud any person contrary to the laws of the place where such act is committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping."

Under this statute to constitute the crime of kidnaping certain things must be proven and these are, (1) that the accused took or arrested another person and carried him into another country, state

^s By agreement the charge of the Judge was given before the arguments of counsel.

or county or to another part of the same county. (2) That such taking and conveying into another state, county or country was done forcibly. While the statute denounces other acts as criminal, constituting the crime of kidnaping, so far as this case is concerned the particular acts charged in the information bring into play only the portion of the statute which relates to the forcible taking and transportation of another into another state, county or country. The third element of the offense is that the forcible taking and carrying into another state, county or country must be without having established a claim according to the laws of the United States or of this state. Establishing a claim means simply the procurement of lawful process for the taking of a person from one state, county or country into another. Various provisions of law have been enacted granting the right under some circumstances to remove a person from one jurisdiction to another for purposes of trial and the issuance of process for that purpose, and when such process has been issued and the steps provided by law have been taken; the removal of a person from one county, state or country to another becomes lawful and in such a case it may properly be said that a claim has been established. In this case, however, there is nothing in the evidence to show that any such claim was established nor any right growing out of any regular process of law to transport Mr. Fred W. Brown, the person named in the information, from the State of Arizona to the State of New Mexico and hence that element of the offense is completely proven in this case. In other words the removal of Fred W. Brown from Arizona to New Mexico, if he was removed, was not justified by any claim established under the laws of the United States or of this state and you may treat as conclusively proven the fact that no such claim has been established. So far then as the substance of crime is concerned the things necessary to be proven by the state are that Fred W. Brown was actually taken and carried from the State of Arizona into the State of New Mexico and that such taking and carrying was forcible. That Brown actually went from the County of Cochise in the State of Arizona into the State of New Mexico is not disputed; that he was actually arrested and marched to the place which has been designated in the testimony as the Warren ball park is not disputed and so far as that portion of the journey is concerned there is no serious dispute that he was forcibly taken from Bisbee to the Warren ball park. But the crime charged in the information is not the taking from one part of Cochise County to another, it is not the taking from Bisbee to the Warren ball park, but the taking from the County of Cochise to and into the State of New Mexico and hence the guilt or innocence of the accused is to be determined by whether the particular crime charged in the information has been proven. The defendant cannot be convicted of any offense except that particularly charged against him. He cannot be convicted of forcibly taking Brown from one place to another except as particularly specified in the information and hence, though the statute makes it a crime to forcibly take and carry any person from

one part of a county to another, that is not the crime here charged and of such a crime the defendant cannot be convicted. It is for you to determine, therefore, whether the defendant forcibly took and carried Brown from some place in this county and state into the State of New Mexico and if this be proven by evidence which satisfies your minds beyond a reasonable doubt then the commission of the offense has been proven unless some matter of defense is established under the rules as I shall present them further in these instructions. But in addition to the actual taking and carrying from this state into the State of New Mexico as alleged in the information the state must also prove that the taking and carrying was forcible. One who voluntarily goes or permits himself to be taken from one state into another is not in law forcibly taken and carried and in such a case the crime of kidnaping is not established. It is incumbent, therefore, upon the state to prove in this case not only that Brown was actually taken and carried from this state into the State of New Mexico, but that he was forcibly so carried and that he did not voluntarily go from the one state to the other. The charge as I have stated is the taking of Brown from this county and state into the State of New Mexico and that such taking and carrying was forcible in character. If at any stage of the proceedings before the taking of Brown into New Mexico he had a reasonable opportunity to withdraw from the body of men then being deported and not go to New Mexico and such opportunity was without unreasonable conditions and he failed to avail himself of such opportunity, but in spite of such opportunity permitted himself to be taken to New Mexico, then his going there is to be deemed voluntary and not forcible, unless his failure to avail himself of such opportunity was due to conditions imposed which he was not bound to accept or unless it was induced by fear created by the acts of the defendant and those associated with him. If, however, an opportunity was given to Brown to withdraw and to remain within this county and state coupled with the condition that he should assist in the deportation of others or take any part in such deportation such condition was unreasonable provided such deportation was not justified by the law of necessity and Brown was under no obligation to accept it and notwithstanding his failure to accept such condition the subsequent carrying of him into New Mexico would in law be deemed forcible. If, also, such an opportunity was afforded him and he failed to avail himself of it through fear of injury to himself if he should so avail himself of such opportunity and such fear was of a character that would be entertained by a reasonable man and was caused by the acts of the defendant and those associated with him or any of them, and acting upon and through such fears alone Brown failed or refused to avail himself of the opportunity, then he would be excused from so failing or neglecting to avail himself and the carrying of him from this county and state into New Mexico would nevertheless be deemed to be forcibly done within the meaning of the statute under which this prosecution is brought.

The burden of proof to establish the guilt of the accused and to establish every material allegation of the information and element of the crime charged is upon the state and these matters must be established by evidence which satisfies the minds of the jury beyond a reasonable doubt. It is incumbent, therefore, upon the state to establish not only that Brown was actually taken and carried from this county and state into the State of New Mexico, but also the forcible character of such taking and carrying and if the jury entertain a reasonable doubt whether he was forcibly taken and carried into New Mexico the defendant is entitled to the benefit of such doubt and consequently to a verdict of not guilty. If the evidence leaves in the minds of the jury a reasonable doubt whether the carrying of Brown into New Mexico from this state was voluntary on his part, the defendant is likewise entitled to the benefit of such doubt. But in determining this matter the jury should take into consideration all the facts and circumstances respecting the claimed seizure or arrest and carrying of Brown into New Mexico, for the purpose of determining whether or not in fact he was given an opportunity to avoid the removal into New Mexico and whether in fact he refused to avail himself of such opportunity if one was afforded, and whether or not such failure or refusal was caused by the imposing of unreasonable conditions or by fear of injury to himself reasonably entertained, caused by conditions which the defendant and those associated with him had brought about; and if the jury believe beyond a reasonable doubt that even though Brown did have such an opportunity or was afforded such an opportunity to avoid being removed to New Mexico but that the conditions brought about by defendant and those acting with him in what has been termed the deportation were such as to excite the fears of a reasonable man that by availing himself of such an opportunity he might cause serious injury to himself and that Brown entertained such fear and acted solely by reason thereof in refusing to avail himself of the opportunity to avoid such removal or that the offer of such opportunity was coupled with unreasonable conditions as before specified, then the jury should find that the removal of Brown to New Mexico, if he was so removed, was forcible notwithstanding an opportunity was given him to avoid such removal, and in this connection the jury should consider also the facts and circumstances shown by the evidence with respect to the manner and character of the so-called deportation and whether Brown had information respecting the purpose for which he was arrested or taken into custody and the extent to which such arrest or seizure was to be carried. And if Brown had no knowledge or notice that he was to be removed from the State of Arizona into the State of New Mexico at the time when an opportunity was given him to withdraw from the body of men seized by those conducting the so-called deportation, but believed in good faith that he had been merely arrested upon a charge of some criminal offense and would be given a hearing or trial within this county and state upon such charge, such fact may be considered by the jury in determining whether or not

Brown's failure or refusal to avail himself of the opportunity to escape removal to the State of New Mexico, if such opportunity was afforded him, was induced by such belief or whether the same was voluntary on his part. But on the other hand if Brown, having this opportunity before the actual removal into the State of New Mexico without conditions and not induced by fear or injury to himself, elected to be taken to the State of New Mexico and for that reason did not avail himself of such opportunity, then his going was voluntary and such removal to New Mexico did not constitute the crime of kidnaping and upon this point, if the jury entertain a reasonable doubt whether his going was voluntary, the defendant is entitled to the benefit of such doubt and should be acquitted. Naturally, the question just presented in these instructions is the one to be first determined by the jury. You will, therefore, first determine from the evidence whether the taking of Brown into New Mexico was forcible or whether he went voluntarily and if after considering the evidence on that subject you entertain a reasonable doubt whether his removal to New Mexico was forcible, you need go no further. If you have a reasonable doubt after a fair and candid consideration of the evidence on that subject whether Brown was forcibly taken into New Mexico or have a reasonable doubt whether he did not go voluntarily, then it is at once your duty to return a verdict of not guilty without consideration of any other question in the case. But should you believe from the evidence beyond a reasonable doubt that the taking or carrying of Brown into New Mexico was forcible and that he did not go voluntarily, then you will pass to the consideration of the remaining questions in the case.

And in this connection, gentlemen, while the defendant alone is on trial and while he is charged with forcibly taking Brown into New Mexico it is not necessary that he should personally have done all the acts which resulted in Brown's being taken into the latter state. Whenever a number of men act in concert in the commission of an offense, whatever is done by one for the purpose of carrying out the commission of the offense is in law deemed done by all. A statute of this state provides that all persons concerned in the commission of a crime whether it be a felony or a misdemeanor, and whether they directly committed the act constituting the offense or aided and abetted in its commission or not being present have advised and encouraged its commission, are principals in a crime so committed. Under this statute, therefore, every person concerned in or who aided or assisted or abetted in or who advised and encouraged the so-called deportation which took place in the Warren District on July 12, 1917, is guilty of the crime of kidnaping if such crime was committed. If, therefore, the jury believe that the defendant Wootton took any part in or aided or assisted or abetted or advised and encouraged the taking of Brown and carrying of him into the State of New Mexico, then the defendant is responsible for all that was done by any of the persons connected with or en-

gaged in the commission of such act to the same extent as if he had in person committed every one of such acts.

It is not necessary that the taking and carrying of any person from one state to another be for an unlawful purpose or with criminal intent beyond the intent to actually take and carry such person out. The crime is complete whenever one forcibly takes and carries another from this state to another state without having established a claim under the laws of the United States or of this state regardless of the purpose for which said taking and carrying are committed and the only intent necessary to constitute the crime is the intent to actually do the act of taking and carrying such person.

As stated before, gentlemen, should you find from the evidence beyond a reasonable doubt that Brown was forcibly taken and carried from this county and state into the State of New Mexico and that he did not voluntarily go and that the defendant participated or aided and assisted in any way or to any extent in the taking and carrying of Brown into the State of New Mexico, then you will pass to the remaining question in the case. But before discussing the law relating to that question it may be well to refer to a number of matters that have been more or less referred to by counsel or mentioned in the testimony. By the statute of this state and by law irrespective of statute, an individual is given the right to defend himself, his person and his property against any unlawful and unwarranted attack by another. This right extends not only to the individual but to any number of individuals and to a community and in a proper case the people of a community have the same right to defend their persons and property against unwarranted and unlawful attacks as has the single individual. But this case presents no situation calling for the application of that rule of law. The defense of necessity will be referred to and discussed later but the evidence in this case does not show such an attack as would warrant the application of the doctrine of self-defense or render self-defense a proper matter for your consideration. You may, therefore, lay aside any question of self-defense as a defense in this case for the simple reason that the evidence does not warrant you in considering that subject. There is no self-defense involved. If the so-called deportation, including the taking and carrying of Brown from this county and state into the State of New Mexico, is excusable, it is only under a rule of law which has been referred to by counsel and for want of a better designation will be here referred to as the Law of Necessity. It has been said by an eminent writer that "Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable, that there was no other adequate means of escape and that the action was not disproportionate to the evil." This admirable language, gentlemen, sums up in its briefest form the so-called rule of necessity. It is obviously a rule that can be rarely invoked and only successfully invoked under extreme circumstances but when the circumstances are such as to justify its application and the one charged with the

crime has acted strictly within such rule it completely excuses an act which would otherwise constitute a criminal offense. The law of necessity simply excuses one when threatened with an overwhelming peril, a peril imminent and immediate and which ordinary means are insufficient to avoid, in taking it upon himself to take such steps as may be necessary to avert the threatened peril even though it involves the invasion of the rights of others. An individual, a number of persons, or a community which faces threatened destruction of life and property and the peril of such destruction is imminent and immediate and overwhelming may, if necessary to avert such peril, not await an attack or the actual consummation of the threatened destruction in whole or in part but may act affirmatively to avert the threatened peril and if in so doing the rights of others are invaded, such invasion is excusable and the one committing the invasion is guilty of no crime. But, necessarily, the evidence claimed to present such a situation should be viewed by the jury with caution and only in the event that such immediate threatened peril is shown and no reasonable means of avoiding it except by commission of the act complained of is shown can the law of necessity be given effect. Before you can find that an otherwise unlawful act is excused by reason of the law of necessity you must find from the evidence that the impending danger feared by the defendant was actually present and in operation and the necessity must be based upon the reasonable belief that no other remedy was available under the circumstances. In addition, as stated by the learned author whose words have been quoted, the remedy invoked must not be disproportionate to the evil sought to be averted. The liberty of the citizen is not to be lightly, for trivial causes, invaded and the forcible removal of one to another state must be based upon real or reasonably apparent necessity for the doing of that particular act. A person may not be deprived of his property or forcibly removed from his place of abode under the plea of necessity unless the threatened danger is so great and immediate as to actually require or appear to a reasonable man under the circumstances to require that such course be taken in order to avert the threatened peril and that such threatened peril is of a character not out of proportion to the invasion of the rights of the citizen. Moreover, the law of necessity cannot justify going beyond real or reasonable apparent necessity. If under such a claim the rights of a citizen are invaded and he be deprived of his property or removed to any distance from his place of abode, such act even though excusable in the beginning, ceases to be so when the necessity ends and if a lesser degree of invasion of the rights of the citizen is actually or to a reasonable man apparently sufficient to avert the threatened peril, then necessity ceases with a sufficient degree of violation of the rights of another and if such violation be carried further it becomes unlawful and not only becomes unlawful as to the extent to which it is carried further than real or apparent necessity requires, but renders the entire act from its beginning unlawful. Moreover, it is not only real, actual and threat-

ened imminent danger that may justify the application of the law of necessity but a situation apparently of that character so appearing to a man of reasonable care and prudence. And as well may that rule be invoked as an excuse for what would otherwise be a violation of law where the situation presents to the mind of a reasonable man the apparent danger of such imminent peril as when such real and threatened peril actually exists. And when men act upon such an apparent peril, provided that the appearance is justified in the mind of a reasonable man, the honest and actual belief that such an imminent threatened, immediate peril exists and he acts upon such belief and upon nothing else, the rule is the same as though such peril actually exists.

So, in this case, if the jury believe that at the time of the so-called deportation there actually existed in the Warren District a real, threatened and actual danger of immediate destruction of life and property or that the appearances were such as to create a belief to that effect in the mind of a reasonable man and that the defendant and those associated with him honestly entertained that belief and acted thereon and in so doing and acting upon such belief invaded the rights of others and deprived others of liberty, then a case is presented which calls for the application of the rule of necessity and so far as they invaded the rights of others who were responsible for the creation of such condition or apparent condition and in so far as they only went to the extent of what was actually necessary to avert the threatened peril, their acts are in law excused. But if the jury believe that there was no such condition of imminent and threatened destruction of life and property in the Warren District or that conditions were not such as to lead to the belief in the mind of a reasonable man that said imminent and threatened peril existed, then the deportation cannot be justified under a claim of necessity. Moreover, if the jury believe notwithstanding any real or apparent condition presenting an imminent and overwhelming peril existed, yet if the defendant and those acting with him went beyond what was necessary or in the opinion of a reasonable man would be deemed necessary to avert such peril then likewise they cannot be excused under the pleas of necessity. Nor can the plea of necessity be invoked to justify the invasion of the rights of those who were not responsible for the creation of the condition, if such existed, that either did or reasonably appeared to create a situation of imminent and threatened peril. Necessity would never justify the seizure and removal of one who had no part in the creation of such a condition and it could not warrant under any circumstances the seizure and deportation of one who had no part in creating the condition or apparent condition even if such existed. And so in this case the plea of necessity cannot justify the defendant or any others acting with him in seizing or depriving any one not actually participating in the causing of the condition that might lead to the claim of necessity. In this case even though the jury believe that a situation was presented calling for the application of the rule of necessity the seizure and deportation of Brown, cannot be justified

unless Brown himself was an actual participant or aided and assisted or abetted in the bringing about of the condition that led to the deportation if such condition was one which really or apparently threatened an immediate and overwhelming peril. If, therefore, the jury believe and are satisfied beyond a reasonable doubt that Brown, the person charged with being deported, was in no way responsible for and in no way participated in or aided or assisted or abetted those who brought about such a condition, even though the jury believe such a condition existed, his deportation cannot be justified. I have said, gentlemen, that one may act upon a situation of apparent necessity, but to justify action that must have been the sole reason and basis for the action sought to be excused. One who acts from any other motive than that of actual necessity or apparent necessity based upon a reasonable belief honestly entertained that such condition exists and such belief is induced by a situation which would give rise to such a belief in the mind of a reasonable man, cannot justify or excuse his act under the plea of necessity. If he acts from any other motive, no matter what, or for any other purpose than to avert the threatened peril his act is inexcusable and if it involves the commission of what would ordinarily be a crime, he should be found guilty. So applying these rules to this case it is indisputed that for some time prior to the so-called deportation there existed among the miners or some of them employed by the various companies operating in the Warren District what has been referred to as a strike. The laws of this state recognize the right of employees to strike, that is to collectively cease work. It recognizes their rights to make demands upon their employer, reasonable or otherwise, and recognizes their right to strike if such demands be refused or for any other reason or for no reason at all. Strikes in themselves are lawful. Striking employees have a right to peacefully persuade others to cease work. They have a right to station persons in suitable places to peaceably seek to dissuade others from working. They have the right to do what has been referred to as picketing and the laws of this state recognize their right to do so and so long as they are peaceable and seek only by peaceable means to attain the end for which the strike is called and to peaceably dissuade others from working, they are entirely within their legal rights. They have no right, however, to resort to force or intimidation either against the employers or their property or against non-striking employees, and intimidation may as well be evidenced by acts and conducts as words. The so-called deportation, if taken as a means for breaking up or ending the strike, was wholly unlawful. Even though the striking employees may have gone beyond the law and resorted to force and intimidation that alone would not justify their forcible removal from the district. Nor could the character of the employees or any organization of which any of them may have been members in itself justify the deportation. Nor could any disloyalty to this government, even though in time of war, justify the deportation. The rights of the citizens are the same in time of war as in time of peace so far as everyone except the gov-

ernment is concerned and no expressions of disloyalty, no treasonable utterances, no failure to measure up to that standard of patriotism that is the duty of every good American citizen could in itself justify a forcible seizure and removal of even the disloyal from the district in which they were. No membership in any society or organization no matter what its teachings, no matter how pernicious its doctrines, or how un-American its utterances, could justify such deportation. There must have been as before stated such a condition of imminent and threatened peril, real or reasonably apparent, as to be actually imminent, and such threatened destruction of life or property really or apparently imminent as would as before stated excuse the invasion of the rights of others before such condition could furnish an excuse or justification for the seizure and removal of others. But in considering whether such a condition existed in the Warren District the jury are entitled to consider all the facts and circumstances shown by the evidence including the character of those engaged in the strike so far as it may be shown by the evidence, the membership of any of them in any organization, and the character and teachings of that organization, not as justifying or excusing the deportation but as circumstances to be given such weight as under all the evidence the jury believe them to be entitled to in determining whether a condition of overwhelming and imminent peril, real or reasonably apparent, existed. For this purpose evidence was admitted concerning the teachings and doctrines of the organization known as the Industrial Workers of the World or more commonly referred to as the I. W. W. The law does not justify the deportation of members of that organization because they are such. The organization and its doctrines are not on trial and the deportation of any member of that organization, irrespective of other conditions, would be as unlawful as that of a non-member. The only purpose for which that evidence can be considered is in determining the character and purpose of the organization and its members as one of the circumstances which may be entitled to more or less weight in determining what was the situation in the Warren District at and immediately preceding the so-called deportation. It is for the jury to determine what the character of that organization was, to what extent the literature read in evidence reflects the teachings and doctrines of the organization itself or the individual views of the several writers and then no matter what conclusion the jury may reach as to the character of that organization and the doctrines as believed in by its members, it is no more than a circumstance to be given such weight and only such weight as the jury think it entitled to in connection with all of the other facts and circumstances shown by the evidence in determining what the situation was in the Warren District; and from this and from all other circumstances shown by the evidence, the acts and conduct of the defendant and those acting with him, and of those deported and those acting with them, the jury are to determine what was the situation in the Warren District on and prior to the 12th day of July, 1917. And for the

purpose of determining such condition the jury may consider and give whatever weight they may think it is entitled to, no more or no less, to the acts and conduct and sayings of those engaged in the strike or acting in concert with them, of the acts and conduct and sayings of those who conducted the so-called deportation or acting in concert with them, and all the other evidence respecting the conditions in the Warren District and from all the evidence determine whether or not the situation existed at and prior to the so-called deportation which would justify or excuse the defendant in acting under the claim of necessity. Another subject may be referred to. Evidence has been given respecting the acts and conduct of the Sheriff of Cochise County and those claiming to be acting as deputies of the Sheriff during the so-called deportation and prior thereto, but neither the defendant or any of those connected with him in the so-called deportation can justify that act upon the theory that either the Sheriff or the defendant or any others acted in the capacity of an officer. The duties of officers of the law, as peace officers, are defined by the statutes of this state and the powers conferred on them as officers are likewise defined by law and beyond the power expressly given by law no officer can go and no act beyond the power conferred upon him by law can be justified and for any act in excess of the power given him by law he may be held criminally and civilly responsible. The powers of an officer given by law do not include the removal of any citizen from this state except in obedience to lawful process issued by competent authority for that purpose. The so-called deportation of a number of people and particularly of Brown, the person mentioned in the information, cannot, therefore, be justified or excused by reason of any claim that the defendant or anyone acting with him was acting as an officer of the law for the preservation of the peace or the protection of lives or property. Whatever might be said as to the question of necessity the act cannot be justified or excused by reason of a claimed acting as officers of the law and if the defendant among the others engaged in conducting the so-called deportation acted upon the belief that he was performing his duty imposed upon him as the deputy of the Sheriff or as a member of the *posse comitatus* summoned by the Sheriff, his act cannot be justified. And if such was the motive and purpose and he did not act under the rule of necessity and under circumstances which warranted his acting under that rule, his act is inexcusable in law and he should be found guilty of the crime with which he is charged. There is no such thing as an officer acting as such under the rule of necessity. As is said by an eminent court, "This rule pertains to individuals, not to the state. It has no connection with or dependence upon the sovereign power. It is a natural right existing independently of sovereign government. The principle applies as well to personal as to real estate, to house as to property, in solitude as in a crowded city, in a state of nature as in civil society." This right it will be seen, therefore, springs not from statutory law or from any law, but from the natural right every

community has to protect itself against threatened and overwhelming peril and when such protection involves that which constitutes the invasion of the rights of others it can only be justified when the situation exists or, under circumstances from which it appears to a reasonable man to exist, which justifies the exercise of this natural right.

That Brown, the person named in the information, was actually taken from this county and state into New Mexico is not disputed. That the defendant to some extent participated in the seizure and removal of Brown into New Mexico is admitted by the accused himself. The questions for the jury, therefore, are these:

1. Was Brown forcibly carried from this county and state into the State of New Mexico or did he go voluntarily?

2. If he did not go voluntarily but was forcibly taken into New Mexico, was the act excused by reason of the law of necessity?

And these are questions for the jury and for the jury alone to determine from the evidence.

Every person charged with crime is presumed to be innocent until proven guilty by evidence which satisfies the minds of the jurors of his guilt beyond a reasonable doubt. The burden of proof is always upon the state to satisfy the jury beyond a reasonable doubt of the guilt of the defendant and of every allegation necessary to make up the crime charged. This burden never changes and the presumption of innocence remains with the defendant throughout the trial and until removed by a verdict of guilty at the hands of the jury. The removal of a citizen from this state to another without establishing a claim under the laws of the United States or of this state, that is, without process for that purpose issued pursuant to some law of the United States or of this state, is presumably unlawful and presumptively constitutes the crime of kidnaping, provided the taking and carrying into another state was forcible. The burden is upon the state to prove beyond a reasonable doubt that the taking of Brown from this county and state into the State of New Mexico was done forcibly and that Brown's going was not voluntary, and if the jury entertains a reasonable doubt upon that subject the defendant is entitled to the benefit of it and to an acquittal at their hands. On the other hand if they are satisfied beyond a reasonable doubt that the taking of Brown into the State of New Mexico was forcible and not voluntary on his part then it is the duty of the jury to find the defendant guilty of the crime charged unless such act was executed under the rule of necessity. There is no presumption that one who forcibly seizes and carries a person into another state acts under the law of necessity and when such a claim is made the burden is upon the one asserting it, but such burden only goes to this extent, that he must produce such evidence as will raise in the minds of the jury a reasonable doubt whether he did not act under all the circumstances in accordance with the rule of necessity. If the jury after consideration of all the evidence entertain a reasonable doubt whether the defendant and those acting with him were not justified in acting as they did under the law of

necessity, their duty is always to give the defendant the benefit of such doubt and acquit him, but if they have no reasonable doubt they should return a verdict of guilty. To justify the claim that an act is excused under the law of necessity it must also appear that there was no other available manner of averting the threatened peril and if the jury believe that other and not unlawful means could have been resorted to by which the threatened peril could have been as well averted and that a reasonable man would under all of the circumstances have believed that such other means could as well be adopted, the plea of necessity becomes unavailable.

I have stated, gentlemen, that the guilt of the accused and all the things necessary to be proven to constitute the crime charged must be proven by evidence which satisfies your mind beyond a reasonable doubt. A reasonable doubt may arise either from evidence or want of evidence in the case. It is a term difficult to define and definitions or descriptions have usually added little or nothing to the meaning of the term reasonable doubt. It is exactly what its name implies, a reasonable doubt remaining in the minds of the jurors after considering all of the evidence in the case fairly and candidly for the sole purpose of ascertaining the truth. It is not a mere fanciful or possible doubt but a reasonable doubt. The Supreme Court of this state has adopted and recommended as a part of the charge to be given to juries, the definition or description stated years ago by one of the most eminent American Judges, in this language: "Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecution. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than to the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

You, gentlemen of the jury, are made by law the sole judges of the weight of the evidence and of the credibility of the several witnesses who have testified before you. It is for you and you alone to say what is proven and not proven in the case. It is for you and you alone to say what weight should be given to the testimony of any witness or what effect should be given to any of the facts and

circumstances which you deem proven in the case. The Court cannot aid you by attempting to sum up or discuss the evidence. The constitution and the laws of this state imposes upon trial judges silence upon such subjects and it is for the jury to remember what the evidence was, aided as they will be by the arguments by counsel, to determine what witnesses testified truthfully or otherwise, to determine what facts and circumstances may have been proven in the case, and to give such facts and circumstances such weight as under all the evidence they deem them entitled to. In considering the testimony of a witness and in passing upon the credibility to be given to the testimony of any witness there are certain matters that the jury are entitled to take into consideration and that is the manner and appearance of the witness while testifying, the impression made upon the jurors by the witness while testifying whether the testimony of the witness carries with it the impress of truth or otherwise. Other things that may be considered by the jury in determining the weight to be given to the testimony of any witness or the credibility of such witness' testimony are the witness' knowledge or means of knowledge, or lack thereof, of the matters to which he testifies; any reason, if any can be shown, or motive, if any be shown, for giving the testimony that he did; any interest in the result of the case, if any such be shown; and any prejudice or bias displayed by the witness while testifying, if any such were displayed, and generally any other facts and circumstances which the jury may deem established by the evidence and which in their judgment bear upon or throw any light upon the weight of the testimony or the degree of credibility to which his testimony is entitled.

THE SPEECHES TO THE JURY.⁹

Mr. Gilmore. Gentlemen of the Jury: After many weeks we have now come together to discuss the testimony in this case. The defense has from the beginning kept in mind two theories, and only two: first, that Fred W. Brown was not forcibly deported as charged in the information; and secondly, that if he was so deported, such deportation was justifiable on the ground of necessity or that such necessity was so apparent as to justify a reasonable man in action on the appearances.

Let me illustrate the latter. A great city is beset by a conflagration. The flames fanned by a gale are rapidly

⁹ Mr. Curley after an active participation in the case up to the 15th of April, was stricken with an attack of appendicitis, which kept him out of the case during the remainder of the trial.

advancing. The situation is apparently hopeless. The Fire Chief conceives the idea that to dynamite a path one or two blocks across the city will enable him to control the situation. He does this from apparent necessity. As the last building is razed in the dynamited area, the winds shift and begin to blow from the other direction, at the same time accompanied by torrents of rain. The conflagration is stayed and controlled before it has reached the area of demolished buildings. The danger was not real, only apparent. But the appearances were such as to cause a reasonable man to act and in such a case the law says the Fire Chief was justified in acting on appearances.

There has been a mass of testimony introduced here in regard to the conditions in the Warren District during the closing days of June, 1917, and the first twelve days of July, 1917, but that testimony was not introduced for the purpose of showing that any particular man or men were guilty or not guilty. It is showing the conditions and the frame of mind of the people and the condition of the individual, and the effect of the conditions of the district upon the minds of the people, which shaped their thought, and when we introduce testimony to show the character of the organization that had charge of the strike, and testimony showing the history of that organization in other places, what they had done under similar circumstances, it was for the purpose of calling on you to look through the eyes of the people in the Warren District on the morning of the 12th of July, 1917. You are put here for the purpose of seeing things that Wheeler saw, and Wootton saw, that other men saw, and for the purpose of thinking, if possible, as they thought. If you can see, under the circumstances that those men judged the apparent conditions as honest, reasonable men would judge those conditions, then you are to say by your verdict whether Wootton under all the circumstances of the cause, is guilty or not.

Out of 1200 men deported on the 12th of July there were a great number that belonged to that murderous organization known as the Industrial Workers of the World, men who

respected nothing, who hesitated at nothing, whose object was absolutely criminal in every respect.

There were men there on the morning of the 12th of July, 1917, who could have testified absolutely and positively, what the instructions of that organization were, whether murderous or otherwise. They could have testified because they were leaders there, because their names were signed to the demands which initiated the strike, and yet there is not one of those men or members of that committee, or members of that organization, not anybody who was a member of that organization is brought here to testify, and Mr. French tries to separate the sheep from the goats. The I. W. W. was there and yet he tells you there is no I. W. W. in this case at all, when you might as well try to play the Hamlet with Hamlet left out, because it is absolutely in the case. It is Banquo's Ghost and it will not down.

No one regrets more than I do the things that happened there on the 12th of July, 1917, and the events leading up to it. Many years ago we had no industrial troubles. My industrial experience was on a little farm in Ohio, where I got up in the morning at four o'clock and worked until dark. We had no strikes; we had no industrial conditions; we had no criminal syndicalism; we had no I. W. W. These things have come into existence in the last few years.

The prosecution says the Courts were open, and the men should have been arrested, indicted and tried. Twelve hundred men were put in the park that morning, possibly more. Some were eliminated. Some were permitted to return to their homes, but approximately 1200 men were transported to Columbus, New Mexico. Well, for the sake of argument, we will have to assume that these 1200 men were guilty and that they should have been tried and either acquitted or convicted.

Under the law of Arizona, every man is entitled to a separate trial. If you have an information containing the name of 1200 defendants, every defendant must be tried separately if he asks it; 1200 trials, 1200 separate and distinct trials. The court has been functioning here for the

last three months and you haven't got Wootton tried yet. Now, suppose they had tried a man a month, and they would have had juries for the work; they would have had thirty-three men tried by this time. It would have taken 100 years to try those men. It is a part of the record of this case that there were 2480 men drawn out of the jury box before we got twenty-four men from which to choose you twelve men. In 1200 trials, you would have had a jury panel of 2,880,000 men. A juror gets \$3.00 a day. It would have bankrupted the State of Arizona. Twelve hundred times seventy-two hundred for jury fees alone if the jurors were here only one day. The Courts were functioning. Now, if each trial had taken as long as the Wootton case, and there is no reason to believe it would not, and you tried four men a year, you would be three hundred years instead of one hundred.

The State says that there were troops in Lowell, in Douglas, at Naco, in Fort Huachuca. But I will show you how much that amounted to. The I. W. W. were going to move on the next day. Is there any reason to believe that those troops could have protected things any better on the 13th than they did on the 12th? Was there a single trooper or a single company moved? Was there a thing done by United States troops at Douglas, or in Lowell, or at Naco, or at any other place on the 12th? United States troops are moved by orders from Washington, and not before, and long before anything that those troops could have done, would have been done by the I. W. W., their sympathizers and friends; there would have been a sea of blood and men's rights, homes and property destroyed before a wire could have gone to Washington and to the Secretary of War and from there an order transmitted to Arizona and the troops finally embarked and moved in the Warren District.

The deportation was pulled off hurriedly. Necessarily some people suffered. People have suffered all down through the period of history and the way that those men were deported shows the bad blood that existed between the two sides that morning. You would not find men going out to

deport their friends or take them on a pleasure jaunt or a joy-ride doing the things that were done over there that morning; there was no love lost between the men who conducted the deportation and the so-called deportees. It is not logical to say that all the men who conducted that deportation were thieves and murderers and robbers. Many of those men had lived in that community for years. They were not men who had been accused of crime; not men who were arrested every month or two for assault with a deadly weapon, or even simple assault, or for any kind of crime. Those men never knew the inside of a criminal court except as jurors or as witnesses. They are not men who would do the things imputed to them unless there was an impelling cause—and that cause was that these men, these strange men, these I. W. W.'s, these sympathizers of the I. W. W.'s were there and that they were afraid of them. As I progress with my argument I will endeavor to show you why they were afraid; why it was reasonable for them to be afraid.

Now Fred Brown was deported. That seems to be clearly admitted, and in order to discuss Brown, I want to read some of his testimony, in order to show you just exactly what kind of a bird he is. Brown's memory is like wine, it gets better with age. It increased in strength right along; it increased from the day he began to testify last summer until the last time that he appeared on the witness stand.

(*Mr. Gilmore* here discussed at length the evidence of Fred Brown.)

The psychologists tell us that there are three different and distinct types of liars in the world; some will qualify for two places; some for only one; some for all three as the circumstances differ.

First there is the liar for gain; next is the boastful liar; and there is the reckless liar. He doesn't know why he lies, but he lies. He is utterly unreliable, incredible under any circumstances. If you would say to him, "John, did the sun rise in the east this morning?" "Why, no, I don't think it

did. No, it rose in the west this morning." And then some other fellow would say he could run a mile a minute any time, that is the boastful liar. And then there is the other fellow who would lie in order to beat you out of fifteen cents. Those are the three types of liars.

Fred W. Brown talked to you on either three or four different days. He had no particular interest in this case except to the amount of twenty or twenty-five thousand dollars and a lot of the state's witnesses. Nearly every man was a man who had a damage suit against the companies and the individuals of the Warren District to the amount of twenty or twenty-five thousand dollars.

Far be it from me to say that they would exaggerate, or that they would seek to hide from you the truth, but I just call your attention to the fact that there is a type of liar in the world who will lie for gain, and I want you to bear that in mind when you are applying your common sense to the facts of this case, to the testimony of these witnesses, in order for you to find out just exactly what the real and truthful situation was on the morning of the 12th of July, 1917, in the Warren District.

Now there was testimony to the effect that Fred Brown was on the picket line. He said he might have been, that was as close as we could get him, but there was testimony to the effect that Fred Brown was on the picket line; that he had a book and that he appeared to be taking notes. Brown says he was getting data for Gompers, the head of the American Federation of Labor. Now he was acting with other men over there whom Wheeler feared and whom Wootton and the other men who took part in the deportment feared. You can't say because there are twelve men engaged in an illegal enterprise and one of them is really not doing anything, but he is in with them, he associates with them, daily, nightly, every day; he is good friends with them; talks with them and goes out with them—you cannot say but that he is apparently taking part with these men in their illegal enterprise. This is what Fred Brown was doing.

Testimony relative to Brown's associates and movements shows he was connected very closely with those men. He knew Embree and the other strike leaders. He knew the I. W. W. He went to the trial in Chicago because Embree asked him and Embree was secretary and treasurer of the I. W. W. organization in the district, and offered his testimony, offered his services to the I. W. W.'s who were on trial there.

Gentlemen, if you can say that the case against Wootton has been proved beyond a reasonable doubt, you can say more than the man from Bisbee did when he was in the smoking compartment of the train going toward Los Angeles, several years ago. There were four men in the smoker, one from San Antonio, Texas, one from Omaha, one from Salt Lake and one from Bisbee, and they got to talking about the meanest man they ever knew, and the man from Omaha said, "The meanest man I ever knew was a man that stopped the clock at night to save the wear and tear on the works." The man from San Antonio said: "I knew a meaner man than that; he writes a small hand in order to save the ink." And the man from Salt Lake said, "Well, there is a man in our town that is meaner than that. He is a man somewhat advanced in years, and he won't read the papers because he claims it wears out his glasses." And the man from Bisbee said, "Well, gentlemen, I guess I will ring for the porter," that he had nothing to say.

Now gentlemen, if you say that this has been proved against Wootton beyond a reasonable doubt and according to the instructions of this Court, that Brown didn't have a chance to get out of line, and that he refused to take the chance and refused to get out of line, then I am in the same fix as the man from Bisbee—I have nothing to say.

On the 26th June there was a strike called in Bisbee. Rumors of it had gone out for some days, whether to strike or not to strike was the question. Harry C. Wheeler who was then the sheriff of this county, after receiving a telephone message and a wire from A. S. Embree the I. W. W. secretary went to the Warren District. He was met by a

delegation of the citizens; they talked things over and they wanted to know what he was going to do and I suppose he told them there was nothing to do except uphold the law and maintain order. On the 27th about 1:30 in the afternoon a committee presented the demands to the company with the statement that they gave the companies three hours for an answer. I want to show you what the demands were. First, Abolition of the physical examination. Second, Two men on a machine, two men in raises.

The physical examination was for the purpose of discovering if possible, whether a man had good eyesight and good hearing, whether his heart was good, and if he had any physical defect that might militate against his safety in working in the mines; and two or three of the State's witnesses admitted that it would be better to have a man with two good eyes and two good ears, good lungs, etc., than to have a man whose eyesight was defective, or whose hearing was defective. So that the abolition of all physical examination was unreasonable on its face. Two men in a raise. Massey discussed that for you; so did Mr. Nottman, and they explained to you why it was impossible for two men to work in a raise all the time, if you had a man to help at certain times.

We come to the fourth demand: Discontinue blasting on shift. Mr. Nottman said that their instructions were to their shifters, *to discontinue blasting on shift*. Massey said that that was all right, to discontinue blasting on shift, but that it was next to impossible. If they could break all of their ore going off shift, well and good, but you couldn't do it in all cases. And Mr. Nottman said that the men themselves refused to follow the suggestion in all cases, and they did have cases where they did blast on shift, but it was contrary to the rules. So that may be classed as unreasonable.

Abolition of the bonus and all contract work. That has not been discontinued. That was in force then, is now. I will leave it to your own good judgment if that is a reasonable demand. I know very little about mining, but I think that if a man has a chance to make more than the ordinary

daily wage, I would consider that he ought to be given the opportunity. If a man has no ambition, he is just like a dumb, brute beast. He is nothing more, if he has no desire to rise above the ordinary level of his fellows. And that was what these I. W. W.'s over there evidently did not want.

The abolition of the sliding scale. They were getting \$5.85 I believe, and then wanted \$6.00, and I will leave it to you if that was reasonable and I will make no comment on that.

The strike was in progress when Wheeler got over there. He swore in a large number of deputies and he proceeded to try to keep the peace. Wheeler said when he got over there that things were in a subdued state of excitement. Now Wheeler had been a ranger; he had been on the line; he had been sheriff; he was afterwards captain in the United States army. He had been seasoned in the hard, bitter school of experience. Now whatever may be said about any other man in this trial, whether truly or falsely, there is no man within the sound of my voice or beyond it who can say one word, breathe one breath derogatory to the character of Captain Harry C. Wheeler, or assail him for honesty, probity, fearlessness, bravery and attention to duty. He served this county as sheriff for six years, and he served it well. He has followed the trails of this county and the trails all over Arizona, in the mountains, on the plains, has followed the river beds, has followed the trails of New Mexico and he has brought back his man every time. The word "fear" is not in his vocabulary, is not appreciated by his mind, and it finds no lodgment in his heart. He never hoisted the white flag and never showed the white feather. And when Captain Wheeler said that on the afternoon of the 11th of July, 1917, in the Warren District, that he was not afraid, he meant that he was not personally afraid, because Wheeler has been in some of the most desperate situations in the State of Arizona, and you are entitled to infer from the facts that Wheeler did not act without believing from the appearance of things and from

the actual condition of things that the Warren District was in a desperate condition.

When, on the afternoon of the 11th of July A. S. Embree, the I. W. W. unleashed the dogs of war, Wheeler knew what it meant. He knew that it meant blood-shed, destruction of property. And when he testified to you that he knew the reputation that the I. W. W. bore in other places, and that he knew what trouble they had had, what lives had been lost, what property had been destroyed, and he feared for his people, he was telling what he absolutely knew and believed. He did as a man should do under the circumstances. He made his last will and testament. He was not afraid to meet death. He was not afraid to go out in the crowded streets and fight a pitched battle with these desperate men, but he took the precaution that he might go out and never come back. That showed that Harry C. Wheeler was acting in good faith, and you cannot question his motive.

What was the situation? The country was at war, in a desperate struggle for its life and Wheeler was there to see that law and order were preserved and that the lives of the citizens were not destroyed and that property would not be destroyed as well. And he had to deal with a desperate gang. To show you what sort of birds they were I wish to go back and call your attention to one or two remarks made by Vincent St. John in his "History, Structure and Methods of the I. W. W."

"As a revolutionary organization, the Industrial Workers of the World aims to use any and all tactics that will get the results sought with the least expenditure of time and energy. The tactics used are determined solely by the power of the organization to make good in their use. The question of right and wrong does not concern us."

They are out to win, they were not playing the game fairly. They didn't care about any fair methods. Wheeler went over to Bisbee on the 26th or 27th June and he found a gang of outlaws there—that is what they were absolutely—a gang of outlaws there pulling a strike. They didn't

care anything about the right and wrong. If they could get the copper mines of the Warren District, they would do it; and you heard the statement read here to you in evidence the other day that they would take things and they wouldn't pay for them either.

Again from St. John:

"Failure to force concessions from the employers by the strike, work is resumed and sabotage is used to force the employers to concede the demands of the workers. In short, the I. W. W. advocates the use of militant, direct action tactics to the full extent of our power to make good."

It is a question of let him get who has the power and let him keep who can. Now these I. W. W.'s were not very much outraged when they were run out of Bisbee in 1917, because it had happened to them before. And such things as I am going to read from now, given in the history of that organization by St. John are just the things that Wheeler was guarding against. Mr. St. John says:

"Beginning in July, 1909, at McKees Rocks, Pennsylvania, 8,000 workers of the Pressed Steel Car Company, embracing sixteen different nationalities, waged the most important struggle that the I. W. W. took part in to that date. The strike lasted eleven weeks. As usual, the employers resorted to the use of the Pennsylvania State Constabulary, known as the American Cossacks, to intimidate the strikers and browbeat them back to work. This constabulary is a picked body of armed thugs—recruited for their ability to handle firearms. Every strike in Pennsylvania since the institution of the constabulary has been broken or crippled by them. Men, women and children have been killed and brutally maimed by them with impunity. Their advent upon the scene in McKees Rocks was marked by the usual campaign of brutality. Finally one of the Cossacks killed a striker. The strike committee then served notice upon the commander of the Cossacks, that for every striker killed or injured by the Cossacks the life of a Cossack would be exacted in return. The Cossacks were driven from the streets and into the plants of the company. An equal number of strikers were killed and about fifty wounded in the battle. This ended the killings on both sides during the remainder of the strike."

Just such a scene as that Wheeler wished to avoid. He knew the bad blood existing between these strikers, between the I. W. W. and the people of the Warren District. He knew that that bad blood would keep on until it boiled and

something would happen, and there would be a killing, and he wished to avoid it. And again:

"On November 2nd, 1909, the City Government at Spokane, Washington, started to arrest the speakers of the I. W. W. for holding street meetings. The locals at that point decided to fight the city and force it to allow the organization to hold street meetings. The fight lasted up to the first of March following, and resulted in compelling the City to pass a law allowing street speaking. Over 500 men and women went to jail during the free speech fight. Two hundred went on a hunger strike that lasted from 11 to 13 days, and then went from 30 to 45 days on bread and water; two ounces of bread per day. Four members lost their lives as a result of the treatment accorded them in this fight. Many more free speech fights have occurred since the one in Spokane, the most notable being at Fresno, California. Here the authorities in cahoots with employers attempted to stop I. W. W. agitation, which was directed toward the organization of the thousands of unskilled workers in the San Joaquin Valley, the fruit belt of California. Street meetings were forbidden in Fresno. The I. W. W. again made use of "direct action" methods, and *filled the jails* of that city with arrested street speakers. The fight lasted for four months and over 100 members were in jail for from two to three months. Arrested members refused to hire lawyers, and plead their own cases in court, or used some member of the organization as their 'attorney.' Finally the organization outside of Fresno took an energetic hold of the fight, and organized a movement to 'invade California.' In accordance with this plan, detachments of free speech fighters started to 'march on Fresno' from Spokane, Portland, Denver, St. Louis, and other sections. Whereupon the Fresno authorities decided that they had enough and surrendered."

"Some of the strikes of 1912. Local Unions 161 and 169 Textile and Shoe Workers, Haverhill, Mass. Two strikes involving 572 members. Lasted seven weeks altogether. Both strikes successful. Sixty members arrested and fifteen of them convicted and sentenced to jail from one to four months."

"Local Union 194, Clothing Workers, Seattle, Washington. Ten small strikes lasting from a few hours up to two months. All of the strikes successful except one. Fifteen arrested, one conviction, two members held in jail nine weeks for deportation finally released. Number of workers involved not specified."

"Local Union 327, Railroad Construction Workers, Lytton, B. C. One strike lasting seven months; 5,000 involved; 300 members arrested; 200 convicted and sentenced to from one to six months. This strike was called off by the local union owing to the failure to keep the line tied up. The contractors were forced, however, to improve wages and conditions."

"Local Union 326, Railroad Construction Workers, Prince Rupert, B. C. Two strikes, both of which were successful, 2,350 workers involved; 12 members arrested, all of whom were convicted and

sentenced from six months to three years. This local also assisted in winning a strike for unorganized workers at the Shenna Crossing."

"Local Union 436, Lowell, Massachusetts, Textile Workers. Two strikes, one of which resulted in victory and the other was lost; 18,000 involved. Number arrested in strikes 26, all of whom were convicted and sentenced to from one to six weeks in jail."

"Local Union 20, Textile Workers, Lawrence, Mass. Five strikes involving 29,000 workers; 333 arrested, 320 of whom were convicted and fined from \$100.00 down and one year in jail. Most of these cases, however, were settled for a nominal fine on appeal to the higher court."

You heard about William D. Haywood. He was the head of it; he was the one that Brown went to Chicago to help out. Haywood said they were working for an organization that will be strong enough to obliterate state boundaries, to obliterate national boundaries, and one that will become the great industrial force of the working class of the world. Haywood talks about their troubles, and this shows that they have been a "direct action" organization all the way through. He says:

"I recall the first general strike in the Coeur d'Alenes, when all the mines in that district were closed down to prevent a reduction of wages. The mine owners brought in thugs the first thing. They attempted to man the mines with men carrying six shooters and rifles. There was a pitched battle between miners and thugs. A few were killed on each side. And then the mine owners asked for the soldiers, and the soldiers came. Who brought the soldiers? Who brought the soldiers? Railroads manned by union men; engines fired with coal mined by union men. That is the division of labor that might have lost us the strike in the Coeur d'Alenes. It didn't lose it, however. We were successful in that issue. But in Leadville we lost the strike there because they were able to bring in scab labor from other communities where they had the force of the government behind them, and the force of the troops. In 1899, we were compelled to fight the battle over in a great general strike in the Coeur d'Alenes again. Then came the general strike in Cripple Creek, the strike that has become a household word in the labor circles throughout the world. In Cripple Creek, 5,000 men were on strike in sympathy with 45 men belonging to the Millmen's Union in Colorado City; 45 men who had been discharged simply because they were trying to improve their standards of living. By using the State troops and the influence of the Federal Government, they were able to man the mills in Colorado City with scab millmen."

"After months of hardship, after 1600 of our men had been arrested and placed in the Victor Armory in one single room that they called the 'bull pen,' after 400 of them had been loaded aboard special trains guarded by soldiers—shipped away from their homes, dumped out on the prairies down in New Mexico and Kansas; after the women who had taken up the work of distributing strike relief and had been placed under arrest—we find then that they were able to man the mines with scabs, the mills running with scabs, the railroads conveying the ore from Cripple Creek to Colorado City run by union men—the connecting link of a proposition that was scabby at both ends!"

Upon arriving in the Warren District, Wheeler's duty was not a very pleasant one. One side was lined up with the citizens of the town, men who continued at work, officials of the mining company, and among the citizens of the town were numbered all of the merchants and their employees.

On the other side he had the strikers, the I. W. W. and their sympathizers, and you remember Wheeler described the I. W. W. sympathizer as one who thinks like an I. W. W. but hasn't the courage to be one; that was a very apt definition. Now he had to deal on one hand with the people who had been in the town, who had lived there for years, who had helped make the community, who made their homes there. On the other hand, he had the I. W. W. crowd and their sympathizers, and some people who were not perhaps I. W. W.'s, but who were misled by those demands, some men who were natural born quitters, ready to go on strike, ready to have some excitement, men who went, not particularly in sympathy with the strike, but went out just because there was a strike, men who didn't have much moral courage, who didn't want to be called scab, but the I. W. W. element was the one behind and around the strike and that gave color to the strike; and that is what Wheeler had to deal with; that was the task to which he set himself on the 27th of June, 1917, and the task to which the citizens of the town set themselves. It was the problem they had to solve, and they finally solved it on the 12th day of July, 1917, by simply running them out and keeping them out of the State.

Now where you have a controversy with a man, where you have a "scrap," mental or physical with a man, where you have an opponent, where you are abused by any man, you usually consider the character of your antagonist. A man who follows the prize ring is always declared the loser when he fouls his opponent—he must fight according to the rules of the game; but Wheeler knew, and the citizens of the Warren District knew, including this defendant, that the I. W. W. were not going to fight according to the rules of the game, but that they were going to take any advantage they could; in other words, they did not underestimate or make any mistake in regard to the character of their adversary.

That is the kind of a proposition that the people of the Warren District and Harry C. Wheeler had to deal with, and that is the reason when Embree unloosed his mask on the afternoon of July 11, 1917, Wheeler decided something must be done and done immediately, and he said to you, "I thought they would strike, and I determined to strike first" and he did.

Do you remember the pamphlet read to you the other day in which they speak of the flag as a rag on a stick? A man who has no respect for his country or his country's flag is not much of a citizen; he cannot be depended on when he says there is no morality, there is no religion, there is no patriotism; then after you have stripped him of that, after you have taken off the I. W. W., every bandage and cloth of manhood and good citizenship, then you have got the I. W. W. stripped naked, and that was the character of the people that Wheeler had to deal with over there and that the citizens of the Warren District acting with him on the 12th of July, 1917, had to deal with—those men and their dupes.

I cannot let this opportunity pass without one or two remarks in regard to the lack of religious faith of the I. W. W. I believe that Christianity is the basis of our civilization; that is susceptible of proof. If you go back to the inception of Christianity, two thousand years ago, you will discover that the countries that are Christian are the coun-

tries that are the most enlightened; that have most advanced; that are most generous to the downtrodden; that are the best countries in the world in which to live.

When Christ died on the Cross, to transpose the first two words of the *main question*, when he said, "Am I my brother's keeper?" He made it read "I am my brother's keeper." The I. W. W. does not believe that; he believes that every man is a liar; that every man who does not believe as he does is a scab; that every man who has a dollar and does not divide it with him is worse than a thief. You have read their doctrines. When you go back and trace the history of Christianity from its inception to the present time, you will see the kindness of Christ, the tenderness of Christianity which finds expression today, and that little house in Thebes where the Christians met to hear the letter read from St. Paul, has its place in the world, and thousands are comforted by a faith that things are going to be better yet. I believe, gentlemen, in the Christian faith which my mother taught me when I was a child—I believe it is a good faith, and that whenever a man or a woman has lost faith in the Christian religion there is something gone, something lacking, and that man or that woman is not to be trusted in this world.

Some man has said, "If you let me write the songs of a nation, you may write its laws." I don't know many songs, but I have heard many, and usually you can tell by the character of the songs you hear sung whether it is "My Country 'Tis of Thee," or whether it is some hymn like "In the Sweet Bye and Bye," or whether it is one of the Great Masses, whether it is Hayden's Creation, or whether it is some of the sweet music of Handel—I believe you can always tell what kind of a man or woman the singer is. Whether the songs are patriotic ones, or religious ones, or sentimental ones—they are always commendable, and they are all upbuilding. But where you find a man who sings of robbery, of rape, who sings of lust, or murder and of bloodshed, they spring from the heart, and the man who would sing the song that was read to you the other day, his

heart must certainly be bad; he is a man who could not be trusted; he would need watching, whether that man was in the Warren District or elsewhere where they sing,

"Onward Christian Soldiers, Onward Christian Soldiers,
Duty's way is plain, Slay your Christian neighbors,
Or by them be slain; Pulpiteers are spouting effervescent swill,
God above is calling you to rob and rape and kill;
All your acts are sanctified by the Lamb on high,
If you love the Holy Ghost, go murder, pray and die.

Onward Christian Soldiers, drench the land with gore;
Mercy is a weakness, all the Gods abhor;
Bayonet the babies, jab the mothers too;
Hoist the Cross of Calvary to hallow all you do.
File your bullet noses flat, poison every well,
God decrees your enemies must all go plumb to hell."

That is the character of the people; those are the men that the people of the Warren District were up against on the morning of the 12th of July, 1917. The strike had its inception about the morning of the 27th of June, 1917, and had continued for a period of over two weeks. The strike was a losing one for the strikers; the I. W. W. was losing out; the men were slowly returning to work.

The testimony of the witnesses on the other side in rebuttal tell you that everything was just as peaceful as a summer day. "Why, we hardly knew there was a strike; we would see a few pickets, see a few men around on the street." Oh, it was peaceful!

It reminded me of the story of the artist who wanted to carve in marble a statue that would exemplify absolute repose, so after a long time he conceived the idea that he would carve in marble a sleeping boy in the shade of the house, in the afternoon, where he had become tired with play and had dropped down and was sleeping quietly and peacefully from sheer exhaustion, and it was said that the idea was so well carried out that when people would look at it for some considerable time, they would actually become sleepy, they would feel relaxed, so successfully had the artist carried out the idea in stone.

A witness testified:

"One man said to me, 'get your gun, we are running out the wobblies'."

"Wobbly" was the popular term for the I. W. W. Evidently that man believed that he was running out wobblies and wobblies only. But the difference between a wobbly and a wobbly sympathizer is just the difference between tweedle-dee and tweedle-dum. Yes, there is this difference, as Wheeler said, one hasn't the courage to become an I. W. W. In other words, the I. W. W. is just a little bit better than a sympathizer. Whatever he may be—he may be a skunk, but he isn't a coward, and the sympathizer is both a skunk and a coward. He also testified that,

"Another man said to me, 'put a white handkerchief on your arm. That shows that you aren't an I. W. W.'"

Up to that time we hadn't had a definition from any of the men. Wheeler said that he had his men put on white handkerchiefs in order to distinguish them from the men who were being deported, in case of a street fight, in case that his own men would not be firing on one another. But this man said, "Put a white handkerchief on your arm. That shows you aren't an I. W. W." That was one of the most enlightening expressions that we have heard from any of the men from the ranks, and that was the one in which he told you what the badge really meant.

There was a large mass of testimony introduced, gentlemen, in which various men examined testified to remarks made by the strikers. When you prove, gentlemen, that in Warren, in Lowell, in Bakerville, in Bisbee, in Brewery Gulch, on the Main Street, and in Tombstone Canyon, and all over the camp you hear continual remarks, "We are going to kill you, we are going to win this strike and make you go out bare-footed. You have got one more day to work; you have got only two days more to work," and when these threats come from men who will stop at nothing, who have no regard for religion, or their country, who were

rejoicing in their hearts that their country was in a war that she would probably lose, and when they were taking advantage of the community at a time when they did, when these reports kept coming in, it showed the people what was taking place and the actual condition of things. There hasn't been a single witness here that ever voted on the strike. They went out; they were led out or they followed out. They were on strike and they were in sympathy with the demands and all of that thing, but they never did vote, not a single one.

A witness testified:

"A few days before the deportation three men came to my front door. They told me they were a committee representing the strikers and they came to tell me to run out all the scabs that were lodging in my house—they would boycott my house if I didn't run them out. I told all I owned in the world in the thirty years gathering was there and I wanted time to consider it, and as they left the small one of the committee turned and said 'How would you like to see it in ashes?' Residents of the district and property owners were afraid something was going to happen, a killing or burning or something."

Another witness says:

"I was working on the streets considerably and of nights when those trains came in there was quite a bunch of these fellows falling off, well from Don Luis on into Bisbee. There was quite a number of them on every train, and walking in from Osborne, I would see them every night, practically, strangers."

"The increase of these men from the time the strike was called up to the day of the so-called deportation was seventy-five percent. They looked to be a tough bunch to me, that is, men who had not worked under ground, you could tell that."

It has been testified here by two witnesses that the remark was made from the lines of deported men on the 12th of July, 1917, in the morning, that "Well, you beat us to it 'only one day.'" You have a right to believe that those men knew what they were talking about. A man has no business to come around and tell you that he is going to kill you at six o'clock tomorrow morning if he doesn't intend to do it. When a man comes around and says, "Well, I am going to rob your hen-roost tomorrow night," and he looks and

acts like a chicken thief, and you have known that he has stolen chickens before in some other community, and he has been convicted for it, or that he has pleaded guilty to it, and he promises you or threatens you that he is going to rob your chicken roost, the chances are that you will lock up the chicken house and watch it with a shotgun. You have a right to presume that he means what he says. However, if such a threat were made by a man whom you know to be a man of integrity, a man whose reputation is beyond reproach, a man whose life has never been assailed, why, of course you pay no attention to it. If Judge Pattee would tell me "I am coming up there tomorrow, Gilmore, and steal your set of Pacific Reporters," I would know it is an idle threat or jest, because I know he wouldn't do it. But if, as I said a moment ago, if some fellow would say, "Well Gilmore, I am going to rob your hen roost tomorrow night," and I would know that he had been convicted of stealing chickens in Benson and in Bisbee, and he was a chicken thief, as I told you before, I would watch the chicken house with a shotgun.

Mr. Gilmore here quoted from the evidence of the witnesses who had been threatened by the strikers. (*ante p.*)

Do you remember the telegram that Wheeler sent to Campbell in which Wheeler said, "I earnestly request you to use your influence to have United States Troops sent here to take charge of the situation and prevent bloodshed and the closing of this great copper industry now so valuable to the United States Government?"

Now Governor Campbell, when he received that telegram, acted upon it. He said in reply:

"Your telegram received reporting industrial situation in Warren District. Have wired Washington authorities your request with my recommendation. Will advise as to my movements as soon as I have reply."

Then he wired the Secretary of War as follows:

"Following telegram dated tonight at eight received from Sheriff Wheeler, Bisbee, 'The I. W. W. strike here is most serious. I

anticipate great property loss and bloodshed. Majority of strikers seem foreign. The whole thing seems pro-German and anti-American. I earnestly request that you use your influence to have United States troops take charge of the situation, to prevent bloodshed and the closing of this great copper industry so valuable to the Government.' I know Sheriff Wheeler to be a fearless man and an officer who considers coolly and acts with good judgment. Would recommend that regular army officer make immediate investigation of situation at Bisbee to ascertain the need of regular troops.

Thomas E. Campbell, Governor."

Campbell knew what sort of man Wheeler was. He knew that it was an I. W. W. strike. He stayed in Phoenix until about the 2nd of July and then went to Globe to take charge of another strike. That is what the officers were up against in 1917. Strikes in Bisbee, strikes in Globe, strikes in Morenci, strikes in Jerome—all over. In other words, the I. W. W. was getting in his work in good style and shape; and when Wheeler and his deputies took charge of things on the morning of the 12th of July and deported those men, they acted because it reasonably appeared to them, as reasonable men, from all the facts and circumstances, that they had to act, and as Wootton testified, that he believed that the property of the Warren District was in danger, and that he believed that lives were in danger, and he acted on that and that alone, when he helped deport these men.

And it certainly, gentlemen, is reasonable to presume that Fred Brown was apparently acting with the I. W. W. element there. Not only that, but I wish to call your attention to this: That if anything is proven beyond any question—why, it is even proven beyond a reasonable doubt—that Fred Brown had a chance to get out of the line and did not embrace the opportunity. Consequently, he went willingly, and if he was not forcibly deported, there is no kidnapping in his case. Now so much for his special case.

Men usually have something that impells them to act. A motive is something that pulls you on. And if Wheeler was not acting in good faith and did not believe that he was protecting the community, and if Wootton did not believe

that he was acting for the protection of the community and was acting in good faith, what in the name of Heaven compelled them to act? Not because there was any glory in it! They might become notorious; you might become notorious by the commission of a crime. You don't become glorious. A man either has a bad or a good motive. Now there could be only a good motive in this case, unless you brand the 1600 men in the Warren District as the most hardened criminals, as the worst cut-throats, as the most brutal men that ever infested any community. And do you believe that? Do you believe that the men who have lived there for years, who have spent their lives there, who have built up good businesses, men whose word is A-1, whose probity and character have never been assailed, that those men are cut-throats and robbers and murderers? Unless you believe that those men acted in good faith, that they believed, actually believed that there was a necessity for them to do that, do what they did do, then you have got to take the other horn of the dilemma and say that these men are the veriest scum of the earth and are not to be believed under any circumstances; that they have not only become notorious in the eyes of the world, but they should be shut up in prison cells, in felon cells, for a long period of years in order that they may have time to reflect upon their sins and their crimes and in order that they may be reformed and made safe for the community. That is what you have got to say.

When Harry C. Wheeler was over in the Warren District and the people were advising with him—he saw the uncertain condition of things when he first went over there and then he saw the change come over the community, and he saw things develop from day to day, and after what he knew about the I. W. W. and knowing that it was an I. W. W. strike, after seeing what he saw and knowing what he knew, I want to say, gentlemen, that Harry C. Wheeler was still “captain of his soul” and still had nerve and courage, and initiative to act on what he believed to be his duty. No man could say that Harry C. Wheeler, after

the course that he has pursued in this County, was anything else except fearless and honest, a fearless and honest officer, and the people of the Warren District believed in him, and the people of the Warren District, at his behest, called together in the early hours of the 12th of July, 1917, and deported the I. W. W.'s and their sympathizers and their dupes. Probably they made some mistakes. The only wonder, gentlemen, is, and my wonder grows every time I think of it—that there were not more mistakes made. Is it not a wonderful thing, that with nearly four thousand men in action there were only two casualties that day, only two deaths, one on one side and one on the other. Four thousand men in action with bad blood between them, with threatening attitudes on both sides, one side armed with pick handles and guns, and the other wanting to be.

This, gentlemen, is the case for the State: That Harry E. Wootton, in company with others, seized and arrested and forcibly deported Fred W. Brown from Bisbee to Columbus, New Mexico, or Hermanos. They all said they went to Columbus and then to Hermanos and then back to Columbus—every witness for the State was careful to explain that. They never forgot it, and they never forgot, not one of them, that everything was quiet and peaceful, quiet and calm in the Warren District—just as pleasant as a May morning. There were some things we were never allowed to forget, among them was that they went to Columbus and back to Hermanos and back to Columbus. Mr. French would say, “where did they take you?” “Well, they took us to Columbus and then to Hermanos and back to Columbus.”

There were 1200 men and some man testified, I think, that there were fifty men to the car; I think they said there were twenty-four cars and every man—you remember that Mexican that they shot at at Osborne? Every man saw that, every one. They were in box cars; they were herded in there fifty men to the car, and there were, they say, twenty-four cars, but every witness that Mr. French brought on

here, saw that—except the women. That is the character of the testimony you have to consider.

Now, if you believe that evidence beyond a reasonable doubt, that Fred Brown was forcibly arrested and deported, you should find Harry Wootton guilty. If there is a reasonable doubt in your minds as to whether Brown went willingly, whether, as one man stated, he wanted to stay with his people, we are entitled to an acquittal. Now, the Court instructed you that if you decided that Fred Brown was not forcibly deported, then you will find Wootton not guilty, and you need not pass to the other branch of the case. If you find that Brown was forcibly deported, that he had no chance to escape, then you are to pass to the other branch of the case,—which defense is, that there was a necessity created by the conditions there beyond the control of the people of the Warren District.

There were two sets of people. There was the lawabiding and the lawless—the merchants and the workers on one side, the working miners on one side, and the striking miners, including the I. W. W. and their sympathizers and dupes, on the other side. Wheeler knew that those two could not exist in any community any longer. The I. W. W. resented the presence of the lawabiding, and also resented the presence of people not of them, and the latter people resented the presence of the I. W. W. and their methods. They were just like matches in a tinder box; just like a live coal and a powder magazine; but the I. W. W. were the ones who created the trouble, always had created trouble in other places, caused property loss, bloodshed, imprisonment and murder.

Sheriff Wheeler had the right to assume that the I. W. W. and their dupes and sympathizers in the Warren District would cause property loss, bloodshed—and to use an expression more forcible than elegant—took the bull by the horns, and acted. If there was no necessity to act, if there was no apparent danger, then all the history of the I. W. W. goes for naught. If the history of the I. W. W. didn't show anything to Wheeler and to Wootton on that day,

you have got to say that the I. W. W. changed their minds, but they hadn't. They put over these demands, and this was the excuse given out in Bisbee to the press and public and the miners, this was the excuse for the strike, but in their own hearts the leaders knew that the strike was really a strike in sympathy with Seattle, in sympathy with Butte. They were lying to Wheeler; they were lying to the press; they were lying to the public; and they were lying to their own people, "double-crossing" their own people. And what did Wheeler and Wootton—those two are the principal ones concerned in this transaction—what did they have a right to expect from men who would lie to their own friends and associates? Possibly they didn't know at the time that the strike was a sympathetic strike, but that was the kind of men they had to deal with, and if they knew the character of the organization, its murderous character, its character for bloodshed, its character for intrigue, its character for destroying property, they had a right to act on that. In other words, Captain Harry C. Wheeler was "Captain of his own Soul" and he knew the situation. He saved the Warren District from bloodshed and from property destruction, and I think gentlemen, that French is right when he does not prosecute him, because he served the people of this County wisely and well.

Mr. Roark and Mr. Worsley addressed the jury for the State.

Mr. Burges. Gentlemen of the Jury: The best way to a right understanding of what is before you is to look at the situation in this county as it was on the night of July 11, 1917, and the morning of July 12, and I ask you to look at it with me in the light that human experience throws around matters of that kind. A man may do a deed of violence in a moment under the compulsion of an overwhelming necessity or even from bad temper, but large bodies of men do not without extreme provocation under any conditions turn their backs on the habits of a lifetime, on those things which at their mothers' knees they were taught to do and which they have done all through the years of their

youth and manhood. Men do not make such a change in conduct without some compelling reason for it. Bisbee is not materially different from any other mining town, or any other American town under similar conditions similarly situated. A great many of you have gone in and out of there for years. You meet the people of that community in its stores, in its shops, in its offices, on the streets; men and women in all the various walks of life, the same kind of people doing those things done by other people under the same conditions, and you receive from them the same kind of treatment which you receive elsewhere. They are men and women born of men and women, raising little men and women in their homes, doing just the things that you do, prompted by the same loves, the same longings, the same aspirations and ambitions that you and the rest of us have. And yet we know that on the morning of the 12th of July, 1917, some sixteen or eighteen hundred of these people for some reason got themselves together, armed themselves and went out and gathered up some fourteen or fifteen hundred of their neighbors and marched them down to the ball park at Warren. There those who wanted to obey your laws and help maintain the orderly life of your country were given an opportunity to leave the park and many did so. Those who were left, some eleven hundred and eighty-eight, were then deported. When you see this done by a body of the same kind of men that you and I are, and you bring to bear upon that transaction the intelligence gained from dealing in the ordinary affairs of life, you know that something was going on in the city of Bisbee which made that action necessary. Counsel say that it was warfare on the union men in the district. There is nothing in the evidence that justifies this statement.

Some of the statistics of this trial are interesting. Fifty-six men were called to testify on behalf of the state. Of these only eight were union men. The other forty-eight were non-union men. It is not true that the question of unionism or non-unionism entered into the controversy at all. With one or two exceptions the men who were called

on to testify were asked whether or not they were I. W. W.'s and almost all of them were asked whether or not they belonged to any labor organization, and forty-eight out of the fifty-six answered they are not members of any organization, and were not at the time of the deportation. That is conclusive. The figures answer everything on that question. The statement is inaccurate and there was no testimony to justify it.

The history of the world shows that there is no point to which some individuals will not go, but a community, a large body of people does not do that way. The thing that makes democracy safe is the fact that the majority of large bodies of men can in almost any and every instance be relied upon to do that which is right and just. It is the saving thing among free people that majorities can be relied on to do right. There are men in every community who do the things they ought not to do, but when a people acts, when the free will of a people expresses itself in voluntary action, when the people of a community or of a state act to save their homes or their institutions, and when not goaded to action by tyranny and oppression without the opportunity for deliberate thought, you may rely on this, that the right will prevail. A sober second thought of a community, the kind of thought that it has when dealing with a large portion of its own people, brings action free from malice and consistent with the best intelligence, purpose and interest of the community. Something was going on in the Warren District on the night of July 11, 1917, and immediately preceding that date which caused that town to rise up; not its outcasts, not its lawless ones, not those that profit by disorder, but the men who came from their own homes, from their business houses, the men who make the town. These people came out and on that day did something totally different from anything they had ever done before. Necessity made them take action in violation of every ordinary thought and feeling. You know and I know, and every man who thinks knows, that back of it all there was an overwhelming reason to cause men to do that thing. Can

you believe that there could be any profit to an ordinary industrial community in needlessly rushing out twelve hundred men, some of whom at least had been there for a long time? A community grows as people come to it, and make their homes there, as people remain and raise their families and do their business there, and every man whose opinion is worth anything is interested in building up the community in which he lives because in this country power and authority in government and in all things come up from the masses and not down from heaven-sent rulers. The greater the number of right-thinking people in a community, the more influence it has and the more it stands for. We are all interested in building up the communities that we live in, in making them better places in which to raise families, in which to maintain our homes, in which to do those things by which we obtain our livelihoods. All communities want the best people that they can get. All right thinking people are interested in making the place in which they live attractive to the best people. The people of Bisbee were not interested, on the morning of the 12th day of July, 1917, in running out of town a large number of men to gratify a lust for power. A large number of these people who were deported had until a few weeks before worked in the industries that sustain Bisbee and had been component parts of its industrial life. They had lived on terms of friendship or at least of peace with their neighbors. Those neighbors had some reason for deportation. Something had gone wrong which made those people act thus. What was it? The record in this case discloses that there are brought before you from all the walks of life in the town of Bisbee, in the town of Lowell and in the town of Warren—the towns that make up the Warren District—ninety-four people. We have merchants, professional men, men who labor in all the industries of the communities from the superintendent of a great mining company down to a foreign mucker, and we have brought before you women from all the walks of life, witnesses of all classes and kinds, to testify each, in his or her own way, to some act of violence,

some threat of violence, to some element of a general condition which justifies us in saying that on the night of the 11th of July, 1917, the law-abiding people of the Warren District, in their homes, justly believed they were sitting on a volcano. Those people who have been our witnesses knew the condition within the district. They knew what those who instigated the strike—these I. W. W.'s—were threatening what was to be the result to the community of their triumph in the controversy then pending. "Oh," but say counsel for the defense, "they didn't mean the threats they were making." I am sure Mr. French will not defend the character of the organization or the characters of the men who composed it and who were the backbone of that strike. It may be that some man friendly to them, who measures up to Harry Wheeler's definition of an I. W. W. sympathizer—"a man who agrees with them in their opinions, but lacks the courage of his convictions" and who is sympathetic enough with them to stand before an American jury and defend them—believes they were going to do no harm, that they did not mean the threats they were making. It may be that such a person believes that when the men, after leaving the I. W. W. hall, lighted a torch before Mrs. Finnoti's home and threw it under the gallery of her house, did not mean to burn it. It may be that such a person believes that when these men who, when they asked a miner with a wife and ten children to quit work and join the strike and were told by him that he could not because he had to support his family, told him to join them anyhow and send his "wife and oldest girl down on the line to earn a living while they won the strike," it may be that such a man, friendly to them, believes they did not mean it. * * *

But do you believe that you would have known that they didn't mean any harm if they said those things to you? Would you have felt secure? Would you have felt that your wife and children were safe when those things were being said in their presence and to you on the streets of an American town? But you are solemnly assured that there was no harm in them because they didn't mean it. They

mean no harm to a working man living under the protection of American law in an American town, working to earn a living by the sweat of his brow for the woman he married and for his children, when they take his dinner bucket away from him and throw it in a ditch dozens and dozens of times during the course of the strike, or beat him over the head with it. Certainly not. It was only a friendly act misunderstood! That did not indicate a spirit of defiance in them! That did not indicate that they were regardless of the rights of anybody else! Harmless! It was for the purpose of showing just how harmless they were that this evidence was offered before you; for the purpose of showing you how dangerous they were that we introduced before you the literature of the organization which called that strike and was responsible for that condition. When you hear the hiss of a chicken snake, you know it means nothing. It can't hurt you, and is not going to, but the rattle of a rattlesnake means danger imminent and deadly to be avoided then or never. On the night of the 11th of July, 1917, the rattle of the rattlesnake was heard in Bisbee—not the hiss of a chicken snake—but the warning of a danger that would bring death and destruction to those who were to be its victims unless the snake were killed and killed quickly.

Do you believe Bisbee to be such a town that without any reason it would go off in a paroxysm of fright and without provocation do such a thing as was done on that day? Do you believe that a majority of the people in any American town are people of that kind? If you do then you have seen some sort that I have not. Do you believe that a man like Captain Wheeler would have been a party to a thing of that kind? That he would lose his head, just go crazy in a moment and see red, and go out to kill or destroy or even run his fellow citizens away from their homes? Is it not far more reasonable to believe that he knew the time had come for action, for drastic action? Was he not, under all the facts and circumstances that have been detailed in the evidence you have heard, justified in so believing? The

witness, Mr. Holmes, a substantial, well appearing, level-headed man of courage and character, went to that town. He mingled with all classes. He went into the hotels, stores and offices where those who were opposed to the strike were engaged in carrying on the business of the community. Into the hangouts of the wobblies and around the pool-halls and other places where the men who were on strike most did congregate. He testified before you that he made it his business to talk with all classes of people and to go around in different parts of town, trying to find out all about the situation. He tells you that from what he heard and from what he saw he left town on the night of the 11th without any knowledge that the deportation was coming off. He went down to Douglas to spend the night. He tells you that as the result of the interviews he had with men in all walks of life during the day he believed the situation in the town had reached a crisis; that something tremendous was going to happen; that the talk everywhere was that the companies would not yield to the demands of the strikers because if they did they would be met with other demands; that yielding would accomplish nothing; that the men who had called the strike had not called it for the accomplishment of the ends indicated by the demands they had made, and that in spite of the fact that a great many men had quit work and that the operations of the mines were being very much interfered with, the fact that yielding was futile made it impossible for the companies to yield, and that therefore the strikers were bound to lose, and realizing that they were going to destroy that town or work damage to it and its people terrible to think of. When you find a man like Mr. Holmes, disinterested, intelligent, certainly not wanting in the ordinary courage of an American so studying the situation and reaching that conclusion, then is it possible to say that no other man could have reached the same conclusion? Can it be said reasonably that no other man was justified in believing the same thing?

Captain Wheeler knew all that was going on there. He had gone around just as Mr. Holmes had. He had seen

countless things many of which he described to you in his testimony. He tells you that he had not caused arrests to be made because arrests only aggravated the situation and added fuel to the flames. That in his judgment nothing was to be accomplished by arresting men, and I submit that he was right. The arrest of one man for doing what hundreds were doing and thousands threatening to do would accomplish no good purpose. No sane man can believe that Captain Wheeler is so wanting in courage that he got panicky. The mere fact that such a thing could be suggested shows to what lengths the prosecution has been driven. There is no man whose opinion is worth anything, who possesses ordinary knowledge of the affairs of this state that are a part of its history, who has lived in this section of the state, but knows that Harry Wheeler is courageous in the highest degree. On the 11th day of July, 1917, he had back of him a long record of honorable and courageous conduct. He had been a line rider on the international boundary between the United States and Mexico. He had been a member of the Arizona Rangers. He was one of that small body of men who carried the law into the chapparal; who made it possible for courts to meet in communities like this and administer law; who made it possible for the communities to live here in peace by expelling at the point of a gun the tide of bad white men which flowed in as the receding tide of bad red men was driven out. He had had experience in the handling of large affairs. His experience as the sheriff of a large, rich, populous county like Cochise had brought him in contact with many men and many situations of various kinds and he brought to bear the wisdom gained in that experience on the condition he found in the Warren District at that time. Is there a man on this jury who believes that in a matter of that kind his individual judgment would be as good as that of Captain Wheeler? Who among you, who in this county had had his training or his experience? Captain Wheeler had his deputies everywhere. Every man in the district interested in its life and its prosperity, those who had their homes there, those who had their

property there, those who had their families there were hearing the threats which were being made, and what they heard was being communicated in the natural order of things to the sheriff of the county.

Let me give you an illustration of it. Down in Douglas on the night of the 11th, Frank Homan, one of the witnesses for the state, stated to a deputy sheriff, Charley Cross, a man whose word will not be doubted by any man on this jury who knows him, a man who has lived in this county for many years, always a law-abiding, law-enforcing man, of integrity unimpeached and unimpeachable--Frank Homan said to Charley Cross while they were eating supper in the restaurant in Douglas, that if the companies didn't yield to the demands of the miners within the next forty-eight hours, they were going to "blow that damn town out of the gulch." Cross immediately communicated that information to Captain Wheeler. That is but an illustration of how all information reaches a common center, the sheriff of the county.

We are looking back on a situation nearly three years after it occurred. What was the situation as it appeared to Captain Wheeler and his associates then? If, as a matter of fact, ninety-four men and women from all the walks of life can be gathered after a lapse of this time to come here and recite before you as they did the story of what happened at that time and that story possibly and probably multiplied many times was poured into the ears of the men on the ground, don't you think that a reasonable man so advised and so informed would have been justified in believing that there was a situation there that called for prompt action and efficient action. Mr. Wootton tells you that he heard those things. Mr. Wootton had testified that Mr. Phillips was one of the men who told him what the danger was, what their purposes were, how they intended to win the strike, by fair means or foul, one way or another. Mr. Wootton says he knew the danger. He had heard the threats and the plans. He knew the character of the people. He was familiar with the teachings of the I. W. W.

He knew what they had done elsewhere, and what they were going to do in Bisbee if they could. He knew it from them, from their speeches and their writings; from their publications. Under the circumstances was he not justified in acting on the knowledge that he had? When Mr. Wootton testified that on the night of the 11th when he answered the call to take part in the deportation and on the morning of the 12th when he took part in the deportation, he acted solely from a sense of responsibility to himself, his family and the neighborhood in which he lived, he gave before you testimony that was unimpeached, uncontradicted, not even seriously questioned. As Wootton saw things and as Wootton acted, so did the whole community. Of course, we have a right to consider the state of the country as one of the elements of the general condition there. The country was at war. The country's need for its every resource was great. Figuratively speaking the world was in flames. The government of the United States needed every tin cup it could get hold of to bring water to extinguish the fire. The law-abiding people, the patriotic people of this country were bending every effort and making every sacrifice, even sending their sons or going themselves to the battle front, to end that conflagration, and some six men, not one of whom is shown to have been employed by any company operating in the Warren District, or carrying on a business of his own, six men, members of the I. W. W., without a vote, without submitting to the people of that district who were to be affected by the question of whether they should or should not strike, without giving the men to be called from work a chance to vote on the question of working or striking, called the strike on about three and one-half hours' notice, and on demands that the Deputy Mine Inspector produced here before you by the state and vouched for by the state tells you "were unreasonable and afforded no justification for striking." "Oh," but said counsel, "if the mining companies had been patriotic they could have yielded to those demands and averted the strike. They were the ones lacking in patriotism." What good would it have done to yield

to the demands? Not a single witness was called to deny that Stanley Clark made this statement, "We will demand \$6.00 and eight hours and when we get it, will that satisfy us? No, we will then demand \$8.00 and six hours. When we have it will that satisfy us? No, we will then demand \$10.00 and four hours. Will that satisfy us? No, we are going to have the mines themselves." You say it wasn't Stanley Clark who made that speech? For the sake of the argument, let us concede it. One of the speakers did. What was the use of yielding to demands if they were to be followed by more unreasonable ones, and that sort of thing kept up until, in the language of the literature read before you, "helpless at last the whole industrial system falls" and "the miners" or "the laborers," as they call themselves, "shall take possession of the world?" "Fellow Workers," as the red-carded gentleman who left the court room a few minutes ago referred to them. Fellow Workers? No. Fellow Shirkers in an hour of supreme national trial.

We are not left in any doubt as to what their real purpose was. We have it from the language of the man who called the strike, who engineered it, and who subsequently became General Secretary of the Industrial Workers of the World in this country. We get it from Embree himself, and what is it? That this was not a labor strike but a solidarity strike. Not to accomplish anything here, that is, in the way of improving conditions or wages of labor, but "as part of the revolutionary movement which makes it difficult for us to explain it to our uneducated workers." A part of the revolutionary movement, said Embree in a letter to that choice spirit William D. Haywood, signed "yours for the revolution." What revolution? A revolution to overthrow your government; a revolution to overthrow the established order of things in this country under which private ownership of property would end, and, as they tell you, "to take and not to pay." "Yours for the revolution!" Embree to Haywood. "Yours for the red dawn!" Embree to Grover Perry. A part of the revolutionary movement! That is important in only one respect, it does not in itself justify

the act of deportation, but, gentlemen, we all know that in great revolutionary movements, when a country or a great cause is at stake, when an individual has ceased to be a factor of any importance, whether it be a forward movement of a cause, of a government or of a people, men do a thousand things they would not do under ordinary circumstances and they do them whether the cause be right or wrong. Men go out and kill on the battle-field, men who would rather suffer death themselves than kill in private life. Men make sacrifices of treasure, of blood, of life, and of all the finer feelings and all those things that men hold dear for their country, for a cause in which they are enlisted, even though that cause may in the cold judgment of history thereafter be proven wrong. Men engaged in a great revolutionary movement are desperate. They will do things that they would not do under other conditions. No amount of private property, no amount of individual suffering, no amount of individual fear would make a man, if he could, overrun a whole province, devastate it, shed the blood of its people, set it back a hundred years in the progress of the world and yet, let that become necessary, for the salvation of a country, for the maintenance of a great cause in which nations grapple in a life and death struggle, let it be done under the most sacred thing in this world, the flag to which a man owes allegiance, then in doing it a man knows that he is doing right.

If, as a matter of fact, as Embree stated in his letter to Big Bill Haywood, it was not a labor strike, but a strike in sympathy with Butte; if it was not a labor strike but, as Embree said in his letter to Grover Perry, a part of the revolutionary movement; if, as Embree said, "demands are trifling, they are not so important," then what was to be accomplished by yielding to them? You, gentlemen of the jury, know that yielding to those demands would have accomplished nothing. The strike on the authority of the man most responsible for it was a part of the revolutionary movement, and we have it on the authority of Mr. Vincent St. John, at one time Secretary-Treasurer of the I. W. W.,

that "as a revolutionary organization the International Workers of the World have nothing to do with questions of right and wrong," and as stated by the organization authoritatively: "We make only one contract of any kind with the employing class, and that is to destroy them, to take everything and to take without compensation." When men can get themselves into that frame of mind, when men can believe such things are right, when men can organize themselves for expeditions of that sort, then they are in a frame of mind where they can do anything, right or wrong, just or unjust, merciful or cruel, wise or foolish that the brains of the maddened men who lead them suggest as conducive to the end for which they fight. If you are dealing with men so led and so believing, part of an organization having such a purpose, then you have to deal with men differently from the way you would deal with an ordinary mob. I am satisfied you have reached the conclusion that I have, that the application of the term "mob" to the men who acted in Bisbee as deporters on the 12th of July, 1917, is as far from an accurate use of the word as it conceivably could be.

Of course there were things done during the course of the deportation that ought not to have been done. No fifteen hundred men ever got together in this world and acted under excitement, acted without effective organization and previous training, but did things that ought not to have been done, for human nature is so weak that it cannot be trusted in fifteen hundred cases to do fifteen hundred times exactly the right thing. There were mistakes made, but when you look back on the record of that day, commencing in the dark of the early morning, on through the dawn and the forenoon, keeping progress with the hours, and see eighteen hundred men going through a town, situated as Bisbee is, after two such troublous weeks as they had had, gathering up the men who in their best judgment were a menace to that community, whom they believed, and had a right to believe, could and would destroy that town; bringing them to a common point, weeding out those who

were to be released, not all possibly who ought to have been released, but all that could be released under the conditions necessarily imposed upon them, when you consider that these 1800 men finally deported 1188, and realize that only two lives were lost out of more than 3,000 men, no bones broken, no heads crushed, only a few scalp wounds, we can only be amazed that the great work was so well done, with so little violence, and with so few mistakes as the records so far have disclosed. Action such as that was not the action of a mob. Results such as those are not the results of mob violence. Yes. No. When a man shoots the man who is advancing on him to take his life he does not act in violation of law but in obedience to it and with its sanction. When men who are seriously assailed or threatened, reasonably believe that they are in such a position that nothing but action and prompt and drastic action can save them or those dependent on them from destruction, the same right of self defense exists that exists in the single individual wherever and whenever he may be similarly situated. That condition of affairs brings into play the rule of necessity that has been submitted to you by the court as the measure of the legal liability of this defendant and the rule for your guidance in this case.

I want to call your attention, so that you may keep it clearly before you during the time that you are considering this case, the only distinction that exists between self defense and the law of necessity as submitted to you by His Honor for your guidance in arriving at your verdict in this case. In self defense a man may do great bodily harm to, or even take the life of, his fellow man to prevent an invasion of the rights of the man pleading self defense. To make applicable the rule of self defense, there must have been an overt act on the part of the man killed, and the rule is the same whether he is killed or only wounded. In other words, to enable a defendant to plead self defense, there must have been an overt act invading or threatening to invade his rights. Under the rule of necessity there need have been no overt act, and instead of the mere protection

against the invasion of his rights, he may, under the proper conditions, be justified in invading the rights of another. In self defense a defendant is protecting himself against the invasion of his rights. Under the rule of necessity for his own protection a defendant may be justified in invading the rights of another. Under the law of necessity, as has been said by this Court, the defendant does not have to sit supinely by until his rights are invaded, property destroyed or injury is done him, but he would be justified in invading another's rights for their protection. Self defense justifies a defendant's conduct in repelling another's wrong. The law of necessity justifies the invasion of another's right. Both the law of self defense and the rule of necessity have existed since law has existed, since human nature has existed. There have been thousands of cases of self defense adjudicated by our courts. The reports of our American courts are full of such decisions. The facts under which a defendant can invoke the application of the law of necessity very much less frequently exist than those which justify the invocation of the law of self defense, but let the facts exist, and then the law of necessity is as well established as the law of self defense. It takes one state of facts to bring a defendant within the protection of the law of self defense, and another state of facts to bring a defendant within the protection of the rule of necessity, but if the facts exist one law is just as binding on courts and juries as the other. One element exists in both cases. In defending yourself you have to believe, honestly believe, from the facts and circumstances that surround you, that the assailant in violation of your rights is about to do you such bodily harm or such irreparable injury that you are justified in taking his life, and the facts which so justify you must have been such as would lead a reasonable man to believe that he was in great danger of irreparable injury, viewing the situation as you view it in the moment of action. Under the law of self defense it is necessary for you to believe, and reasonably believe, that on account of the acts of your assailant the situation is such that unless you act and act

promptly you will lose your life or suffer irreparable harm, that is you or those whom you have the legal and moral right to defend. Under the law of necessity, it is necessary for you to believe from all the facts and circumstances surrounding you, viewed in the light of those facts and circumstances, and as they appeared to you in the moment of action, that it is necessary for you to invade his right in order to save yourself from an imminent irreparable harm not disproportionate to the act you do to save yourself. Whether it be in self defense or under the rule of necessity, a citizen is justified in acting in defense of his own life or the life of a member of his family or friend or neighbor, whoever puts upon him the kind of moral obligation for support in the hour of danger which governs and actuates the conduct of man.

Applying the law to the facts there can be no escape from the conclusion that when the defendant invoked the law of necessity in this case, he stood before you, Gentlemen of the Jury, exactly as though he had on the morning of the 12th day of July, 1917, been attacked by any one man or any combination of men, and believing that this man or combination of men were there for the purpose of accomplishing his destruction, taking his life, or destroying his property, or taking the lives of his family, and honestly so believing, and following an overt act indicating the purpose of the assailant or assailants, had taken the life of such person or persons under a state of affairs such as I have just stated, the right of self defense would not have been open to question in any American Court. If, on the morning of the 12th of July, 1917, Harry Wootton believed, upon evidence such as would naturally induce a reasonable man to that belief, that his own life or his property, or the lives of his wife and children, or the lives and property of his neighbors were in such danger from impending acts of the deportees that it was necessary for him and those similarly situated to band themselves together and protect themselves against imminent danger by the deportation of these men, then and in that event he was protected by the

rule of necessity just as he would have been by the law of self defense in the case as first stated. The only difference is that in one case, under the law, an overt act is necessary. In the other case, under the charge of the court, no overt act is necessary. In the first case as first stated under the law of self defense Wootton would have been defending himself against the invasion of his rights. Under the case as last stated, Wootton would have been under the charge of the Court justified in invading the rights of the deportees. If, under the first case, Wootton had taken the life of his assailant, it would have been an ordinary case of self defense. The assailant would have been dead, Wootton would have had a formal trial, and a verdict of not guilty would have been given. No excitement would have been created. The incident would have been altogether commonplace and in the usual order of affairs. A few hours in court, laying the facts before a jury, charges on the law of self defense given by the Court and that would be the end of it. The great difference at last is not in principle but in the circumstances that bring one rule of law into action as distinguished from the other. If, on the morning of July 12, 1917, Harry E. Wootton in fact believed that a condition existed in the Warren District, as the result of which a large body of men were banded together and were about to take his life or the lives of his family, or the lives of his neighbors or destroy the community by the use of dynamite or otherwise, in other words to do him or his family or neighbors an irreparable injury, he was under no obligation in law or morals to sit idly by and wait until that thing was done. Then the right would have been useless to him. A right that can only be invoked after your destruction is worth nothing to you. He had the right to defend himself. If the combination of facts and circumstances were such that it was impossible to wait until after the first overt act, if the necessity for action existed, if he and his family and his neighbors were to be saved, then and in that event, he was protected by the law of necessity.

To go one step further, if the facts and circumstances had

not in fact existed and there were no actual imminent danger to him or his family or his neighbors, or the community in which he lived, but only the appearance of danger, if although there were no danger but he honestly believed there was a danger and that belief was such as a reasonable man would have entertained under all the facts and circumstances of the case, he then and in that event had the right to protect himself and those dependent on him just as though the danger had in fact existed.

I am not going to argue with you whether or not Mr. Wootton believed the action he took was necessary. I take it for granted that no person with self respect and a sense of responsibility, responsibility to the law, responsibility to the people among whom he lives, responsibility to himself, is going to say in the face of this testimony that he acted from any other motive, or that he had any other thought or purpose in his mind than the salvation of the lives and the property of the community in which he lived. Now, gentlemen of the Jury, bear in mind that this strike, involving thousands of men, and the means of livelihood of many thousands of people, and the production of an article of overwhelming necessity to this country then at war, and of which strike this defendant Wootton was one of the victims, was not a strike of his employees, because he had no strike among his men. He employed some union men and some non-union men. Some of the men working for him were members of a union, some were not. He was paying, as the undisputed evidence shows, higher wages than anyone else in the district, and he had no controversy with his men, but he was under boycott and threats had been made to him and about him that he was to be destroyed, run out of business; and a young man then recently arrived from the state of Minnesota who had never had any business with him, who was not an employee of Wootton, had notified him that he would run him out of Bisbee, break him up in business and drive him out of town. That young man was Fred W. Brown, the complaining witness in this case. I am very much disposed to think that the extreme limit of human

effrontery has been reached when a man who has lived for years in the community, established his business there, made his home there, has his family there, can be called on by a young stranger of a few months' residence in the district—an interloper from another state, together with a red carded I. W. W. and another walking delegate of the same ilk—and notified that because they do not approve of the way he is conducting his own business, they are going to break him up in business and run him out of town. I rather imagine that if this message were carried, instead of to a man in a modern town, to one of you ranchers, it would not take a deportation to settle it. I have served my term as a cowboy. Years of my life have been spent on the farms and ranches of Texas. I know the kind of men who have made that state, and the kind of men who have made this state, and I think that if this committee of walking delegates, mark you, I did not say working delegates, had visited any one of you on your ranch and had made that threat, the legal proceedings which followed would not have been under the technical definition of kidnaping. They would have all been in another form.

But Mr. Wootton, like the men living in Bisbee, like almost any man living in a city and under city conditions, did not take the law into his own hands. He got ready to try and meet the storm. He had not brought about the situation. He was the helpless victim of the malice of these fellows, who calling themselves laboring men see red whenever they see a man earning a living by honest, peaceful, efficient work. Wootton was doing the best he could under the law to which he is subject and for which he appears to have a very high regard. He was trying faithfully to conduct his business and look after his own home and his own family. Was Mr. Wootton justified in believing that these men intended to carry out their purposes?

On the morning of the 12th of July, 1917, without waiting for the overt act that would have destroyed the prosperous little city, without waiting for the forty-eight hours in which old Bendixen was to be driven out of the town and the

strikers were to have his wife, Wootton, and his associates, under the leadership of Captain Wheeler, took the men, the red-card men, the men who do things with dynamite in Bisbee, and marched them out of town, and turned them over to the soldiers that could not be sent to them. In a phrase not elegant but descriptive of the situation, we beat them to it.

Your attention is directed to the fact that there is not one single material contradiction of the people who testified concerning acts of violence, as to what they had seen and threats they had heard made. We brought you ninety-two witnesses from Cochise County. There would have been no difficulty in contradicting these people had their testimony been false. The machinery of the law affords the means. If their testimony was untrue, why did the prosecution not bring witnesses to contradict them, and to establish the falseness of the testimony? How much more persuasive would it have been to produce witnesses to testify that a thing did not happen, as stated by the witnesses for the defense, than merely to bring witnesses to testify that they had not heard threats or seen violence.

In the consideration of this case, we have to deal with the state of mind of a community, not an individual. It cannot be contended that we are offering now for the protection of these defendants a state of facts and a state of mind that did not exist then, and it cannot be contended that Captain Wheeler now pretends to have believed in a state of affairs different from that which he believed in at the time of the deportation. The first telegram sent by Captain Wheeler shows just how the thing appeared to him, that the strike was an anti-patriotic movement, that it was a pro-German thing, that it was an I. W. W. thing, that it was a serious menace to the community and he called on the governor for help, help which if it had been given him as he asked for it, would have prevented the very thing that has since happened. Harry Wheeler saw the storm gathering. It was apparent to him when he talked to the witness Vaughn two days before the deportation. "It looks threatening, it is

dangerous, there is something about the very quiet of it that makes it awesome to me." It was the calm before the tempest. Was that the thought of a man afraid, of a cowardly man, of a man wanting in ordinary courage? That was the way it looked to a man whose courage is as good as that of any mortal man. That was the way it looked to the eyes of a man who for years had carried the law where bad men were and brought them in to answer before its tribunals. That was the way it looked to a man not in the employ of the companies over there in Bisbee, not in the employ of the citizens of Bisbee except as he was their officer. That was the way it looked to a man whose only object was to keep the peace of that community, to get it back to normal life, to get it again discharging the functions which it owed to this country at war. All the evidence in this case shows you beyond the shadow of a doubt that the controlling, predominating influence in his life was absolute, unswerving devotion to the interest of his country as he saw it. Can you believe that Harry Wheeler—a fanatical patriot if you please to call him so, and I do not, because patriotism is an admirable thing—do you believe that Harry Wheeler, wanting above everything to offer his services and life, if need be, to his country, heart, soul, mind and body, in the struggle, did not realize that seven thousand men digging copper could do more good for his country than twelve hundred men on the deserts of New Mexico that we have heard so much about? Seeing things as he saw them, having on that day heard Embree, strike leader, hurl his defiance at the Mayor of Bisbee and say to him "I cannot and will not any longer be responsible for my men," said of men whose records were as red as the flags they carried, of men as malignant as cobras, as venomous as rattlesnakes, can you believe that with those things in his heart and mind, with the situation as he knew it and in the light of the facts and circumstances as they surrounded him, that Captain Wheeler acted with aught but prudence and reason when he called this defendant and those who went with him to save the community they lived in from the peril that was

imminent? Captain Wheeler, as sheriff of Cochise County, carried the responsibility of keeping the peace and maintaining order. Under the sense of that responsibility and with the facts before him, he made up his mind to act and act in a way that settled the question forever, settled it without bloodshed, settled it in such a way that those who were expelled though they suffered hardships for a few days, nevertheless had life, health and strength to go their way or come back to Bisbee if they were willing to come back to obey the laws of this state and conduct themselves as law-abiding, peaceable, patriotic citizens.

Captain Wheeler did his part and did it well. He came before you and testified like a man telling the truth. He testified to the dangers as he knew them, to the things that led him to believe that the hour had come when the streets of that town would run in blood or the property which sustains it would be destroyed unless he acted and acted promptly. If you choose to say that subsequent events prove that he was wrong, put yourself in his position and see if you can say that there was nothing from which a reasonable man would have believed, as he did on the night of July 11, 1917. If you can say that there was nothing to justify such a condition, you must do it by wiping out the testimony of the ninety-four witnesses in this case who have told you their stories. We are bound to believe as reasonable men, that he had before him such information as justified a man of good intelligence, good courage and good purpose, acting as a law-abiding, peace-loving and peace-enforcing officer to apply the heroic remedy he did apply for the salvation of the people of that district and when all is said and done, this can be said for Harry Wheeler:

"His lot was cast where giant forces met,
He battled bravely to put the lawless down,
Detraction cannot dim, nor time forget,
The living splendor of his just renown."

I would rather that might be said of me, I would rather have earned it by service rendered, than to have any honor in the gift of the people.

Did Wootton have a right to act with him? Wootton was living in Bisbee in a home he owned. He had come there as a young man, had built up his business, had married and his wife and his children were with him. He was endeavoring to take care of and provide for that family and to meet his obligations as a man should.

He had a right to stay there, in peace, not to be broken up in business, and not to be run out of Bisbee by Mr. Fred Brown or his associates with or without red cards. He had had no part in it. He was not a great employer of labor, or managing one of the big businesses that have made the Warren District and sustain its life. But he tells you that he believed, and the evidence is uncontradicted and unimpeached, that on the night of the 11th of July he believed a great and overwhelming danger was hanging over the town. He knew, and his knowledge is as indisputable as the facts, of the bull-doing that was being practiced by the strikers and their sympathizers under the leadership of the I. W. W. committee appointed in an I. W. W. hall and making their reports to the leaders of the I. W. W. organization in the state and at the general headquarters of the I. W. W. in Chicago, of their progress in this incipient revolution. Wootton knew of their threats, of their dark deeds in other communities, of their wicked purposes in the Warren District as proclaimed by their literature and their speeches. He knew of their efforts to intimidate the men as they went to work. Did he have a right to believe that Brown meant what he said when Brown told him that "we are going to drive you out of the district and break you up in business?" Who was Mr. Brown that he had the right to give any such notice to an American citizen? Brown was the man who down on the picket lines was getting from men with I. W. W. buttons on their coats the names of the men that went to work, though he says he was getting them in order that he might send them to Mr. Gompers. Mr. Brown was the man who several times during the strike was in the I. W. W. hall; Mr. Brown was the man who went as a **voluntary** witness to Chicago to testify for the I. W. W. as an organ-

ization on trial for high crimes and misdemeanors against the government and laws of the United States. This same Mr. Brown was given a chance to get out of the line and wouldn't take it because he intended to stay and go with his people. This was the Mr. Brown picked out by Milo W. Porter, Secretary of the I. W. W. in the Warren District, and furnished money to come out here from Minnesota and undertake the preparation for trial of this and the civil suits against the companies and the citizens of the Warren District. This was the Mr. Brown who Porter thought would be interested in knowing of the destruction of the Copper Queen Warehouse and the Copper Queen Store by fire, and to whom Porter said "The old Queen is suffering a lot these days as a result of which they are leaving us alone, and it will all be charged up to the wobblies." Mr. Brown was the man picked out by the Secretary of the I. W. W. to receive that kind of a communication.

The night of July 11, 1917, found Harry Wootton at his home with his family around him. After midnight the summons came to him, as they came to so many others of the best men in that district, to join their neighbors in expelling from the community a lawless body of men banded for a revolution against your government and threatening the destruction of the homes and the lives of the patriotic people of the District, and Wootton answered that summons. Is there one among you, Gentlemen of the Jury, who would not have answered that call as Wootton answered it? I believe the prime duty of every man on this earth is to stand with his own people, with the government to which he owes allegiance, with the state of which he is a citizen, with the people of whom he is a neighbor. The measure of a man's duty in a case like that is well expressed in the language of Ruth to Naomi:

"Intreat me not to leave thee or to return from following after thee; for whither thou goest, I will go and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God: where thou diest, will I die; and there will I be buried; the Lord do so to me and more also if aught but death part thee and me."

Wootton's opportunity came on the night of the 11th of July, 1917, and the morning of the 12th. Simply to fail when your neighbors and fellow citizens are in deep trouble and call on you is in itself an unspeakable dishonor. Wootton heard the call and he was willing to pay the price of answering it. He took his place with the men who were guarding and protecting and saving the men and women who were making Bisbee, and are making it. On his side were peaceable, law-abiding, patriotic Americans typified by Captain Wheeler, by Wootton himself, by the other defendants whom you have seen before you.

For his part in that day's work Harry Wootton is now picked out as a vicarious sacrifice for the deeds of the community. Mark you, I say deeds and not the misdeeds, because as I live and speak to you, I believe that what this defendant and those who acted with him did there that day was right in law and right in morals. From the very beginning Wootton was marked for a victim. We find proof of it in the effort of Fred Brown and his associates to break him up in business and run him out of town. They had said they were going to make an example of him, and they failed to do it, in the manner they had intended, so they resorted to this effort to send him to the penitentiary for doing what he did in common with eighteen hundred of his fellow citizens. As a matter of course, Gentlemen of the Jury, in any movement of that kind, there were leaders, men of weight and standing in the community, men of more influence on account of their position than Harry Wootton had, but they are not before you to answer for what they did on that day. The men with whom Harry Wheeler counseled in arranging the deportation, men who represented the big industries of the community and controlled them, the men who run the banks and the stores and the professional men who guide a community's thoughts and acts are not before you, but a private in the ranks is picked out for sacrifice for the community in which he lives and which he served so well. Who is demanding this sacrifice? What manner of men they are is made clear to you by the

books that they printed and which have been read to you in evidence; by the songs which they published "to fan the flames of discontent." On the night of the 11th of July, two flags were flying in Bisbee, one "the Workers' flag of deepest red," the other your flag and my flag under which American boys were dying in a foreign war in foreign lands. No man could stand under both these flags, and there was no man but must stand under one or the other. When the call came to Harry Wootton, he took his place under our flag. If there is any man on the jury who believes that if that call had come to him that night, he would have taken his place under the other flag, if there is a man on that jury who believes that when the call came his efforts would have been

"To keep the scarlet standard flying high,
Beneath its folds to live and die,
Though cowards flinch and traitors sneer,
To keep the red flag flying here,"

then he has his chance today by voting guilty in this case. Every man to his choice now. Harry Wootton had his and he took it, and you know which side he stood on, and from the very depths of my being, I am grateful for the opportunity to stand today with Harry Wootton and the men he stood with on that day for the preservation of their homes and their honor, their community, their state, their nation and the lives of those dependent on them. There are two sides now, just as there were then, our side and the red side, the right side and the wrong side. There is no middle ground. What those men did that day was right, eternally right, or it was wrong and no defense can be made for it. If, honestly believing, as reasonable men might believe, that they were confronted with the danger of an irreparable injury which could only be prevented by the means they took, and that in acting as they did, they acted in obedience to the best impulses of the human heart and for all that men hold dear, all that makes life worth living, then there can be nothing criminal in it, and I respectfully submit, Gentlemen of the Jury, that under all the evidence

in this case, you as responsible men, cannot escape a conviction that these men acted thus in loyal devotion to their country, to their wives and to their children and to the right as they saw it.

Midnight on the night of the 11th of July found Harry Wootton in his home, with wife and children around him. The call came and like a man he answered it. He did his full part and his full duty during the morning of the 12th of July. He did no violence, he shed no blood, he violated no law. Noon of the 12th found him back in his home again able to look his wife and children in the face with the consciousness that he had served them well in the hour of trial, and it is for you, Gentlemen of the Jury, to say whether or not he shall be back there in that home with his family again this evening, or in a felon's cell. If you think that this young man for bravely, honestly, but humanely, playing his part as a private in the ranks ought to be made a vicarious sacrifice for the deeds of that community, it had just as well be Harry Wootton as anybody else. He has not sought to shield himself from the consequences of anything he did on that day. I have no doubt that he is proud of it, that he will tell his children's children of the part he bore in it and if he had it to do over again, he would do just what he did on that day, and he wants the stamp of approval of an honest and intelligent jury on the part he played in the Bisbee deportation. Look to your own hearts, ask yourselves the question, "Had I been in Bisbee on that day, would I have been with Harry Wootton, or would I have been with the I. W. W.'s?" In answering that question, endeavor to see it in the light of things as they appeared to the people of that district on that day. See again on the streets of Bisbee a large number of men gathered from unknown parts to intimidate the law-abiding people of that community. Hear again the threats made by them. Weigh well the consequences of the failure to act in time. Give due weight to the fact that the country was at war, that what the strikers were doing was not an endeavor to better their condition, but was a part of a revolutionary

movement. Consider that their purpose was the overthrow of your government and the bringing in of the red dawn of a day when men like Embree and Haywood and Grover Perry and Vincent St. John, and the men of their type, would rule your country. Reach your conclusion in the light of these undisputed facts, and then if you believe that your part would have been with them and not with Wootton you have your chance to show it by voting for his conviction. If, on the other hand, you believe you would have taken your part, humble though it was, as a producer of the necessities in the great world struggle then on; if you believe that the success of these people should have been prevented at any cost; if you believe in preserving property, in keeping the peace, in obedience to law, if you believe as the evidence fully justifies you in believing, that Harry Wootton acted under the compulsion of a necessity to save what you and he and all right-thinking people hold dear, and above all, to save himself and those dependent on him and those with whom his lot was cast, from an injury, imminent and irreparable, then under the law of necessity as defined to you by this Court, and in obedience to that law, as firmly founded as any principle of law under which we live, as old as human nature and as eternal as justice, he is entitled to a verdict of not guilty at your hands.

Mr. French. Gentlemen of the Jury: There are issues involved in this case, other than those of the guilt or innocence of Harry Wootton, which make it the most important that was ever tried in any part of the United States.

You are asked to believe that the strikers consisted of strangers who had come to the Warren District to make trouble. You have heard that throughout this entire case; all the witnesses who testified before you were asked about the strange faces there, and counsel for the defendant would have you believe that there was no one in that strike but strangers. Now, what are the facts? You heard the evidence of the defendant's witnesses put on the witness stand who were sent down to meet the incoming trains and there was not a single witness who saw more than ten or twelve

strangers come into Bisbee on a train. I will take their figures, and ten or twelve a day came in a little more than two weeks. Two hundred strangers in the city of Bisbee, according to their own evidence, and yet they would have you believe that almost every one of those who were deported on the 12th of July, 1917, were strangers, who had been imported into that town by the I. W. W. Organization for the purpose of wrecking that town. They would have you believe that a strike was a danger in itself. The Court has told you and settled that question more ably and clearly than I can do, that, "people have a right to strike," workmen have a right to strike; they have a right under the law of Arizona to picket. "Those strickers," necessarily because they were strikers, were going to do something terrible; because they were there picketing, they were an awful bad crowd. Why, didn't you see Brown up on the picket line? As if it were a crime to be there; as if it was no place for a working man to be, and yet the law as laid down to you by this Court tells you, that they had a right to be there, had a right to be picketing, the same as you have a right to sit on that jury, or that I have a right to address you as jurymen.

Gentlemen, I am no anarchist; I am no I. W. W. I believe in private property; I believe in private rights, but I can see and respect the opinions of others, and as between the capitalist and the workingmen, if that is the issue, and if I have to choose between these two classes, I will take my stand by the workingman. Not that I will join the I. W. W. organization. Never! Not that I will join any anarchistic labor organization; Never! I have never belonged to a labor organization. However, I would like very much to belong to the American Federation of Labor, if I were eligible, because I think it is a great constructive organization. It contributed to a great extent in the success of the World War. Samuel Gompers, perhaps, did as much as any other man for this country during the period of that war.

Mr. Gilmore, after reading the I. W. W. song-book that

has been referred to here, would have you believe that the I. W. W. were about to destroy all Christianity. I am not here defending them. Christianity needs no defense. Its founder first proclaimed the Doctrine of the brotherhood of man, and so far as I am informed, He never taught the law of necessity nor the right of deportation. I started out in this case with the statement that there would be no I. W. W. witness introduced here, and that no one would be tried for deporting an I. W. W., and I have made good that statement. Some of the witnesses who testified have been accused of being I. W. W. It is not true. I investigated the matter before I brought them here.

Since these cases were instituted here, I have talked with many I. W. W.'s, and asked them, "Did you know what that organization was?" "No, I just took out the card because they kept after me, and I took out a card to get rid of them." I believe there are I. W. W.'s who are dangerous men; some of the most talented men in that organization are the most dangerous ones. On the other hand, there are good men who have taken out cards in it, and they didn't know the doctrines; never understood their principles, or they would never have joined it.

I want to call your attention, gentlemen, to something that you will find in Leviticus. We are not allowed to read law books or bibles in court, but you will find in Leviticus that the Children of Israel would, once a year, in order to purge themselves from all of the sinful acts that they had committed during the year, take a goat and would go out on the desert and the priest would take that goat and some one would hold the goat; and the priest would call down all the sins of all the Children of Israel on that goat's head. Then the priest would take the goat out so many days' journey in the wilderness and turn it loose, and the goat would wander off by itself and, perhaps, be devoured by the wolves or other carnivorous animals that inhabited the desert through which they were passing. Harry Wheeler is the goat, or would have been the goat for the deporters of the miners from Bisbee, July 12, 1917, if I had not pre-

vented it. Counsel for these deporters have called down the sins of that deportation on the head of poor Harry Wheeler, and he meekly sat there and allowed them to do that, and now they are trying to turn all those sins off of their shoulders upon Harry Wheeler, and let him take the consequences. That is what Mr. Burges asked you and future jurors to do in his argument this morning. "If anyone must be punished," Mr. Burges tells you, "let it be Harry Wheeler." Now, I asked Harry Wheeler, "Tell the jury why I wouldn't indict you." Mr. Burges objected to the question. They didn't want him to tell you why I wouldn't indict him, and the Court sustained the objection. It was to prevent Harry being made the goat, that I did not file an information against him, and I so told him. I said, "Harry, they can't make a goat out of you. In due time I will attend to you, but all who were there who were a class, who I thought should have known better than to have pulled off that deportation, all who were there who I thought were responsible for their own acts, and were men enough to answer for their own acts, shall be prosecuted, and they can't call down the sins of that deportation on your head, Harry." That is why they objected to Harry's telling that to you, gentlemen of the jury.

Mr. Gilmore has eulogized Captain Wheeler. He would make you believe that he never lowered the flag; that he was a regular Henry of Navarre, with his white plume streaming in the winds on every battle field. I have known him for years. I have nothing, personally, against him, as I have nothing personal against a single individual defendant here. They are my friends, and I know that I am their friend, but I have a duty to perform, as each one of you gentlemen has, and I am going to do it, friendship or no friendship. I believe Harry Wheeler is a man of good courage, but I don't know that he has ever been called upon to show any extraordinary valor or exhibit any extraordinary courage.

During the two days that I cross-examined Captain Wheeler, he said, "I don't remember," at least five hun-

dred times. He had said that he could not remember this, so I asked him, "Captain Wheeler, you have a very bad memory, haven't you?" And he said, "Yes," only very important things made any impression on his memory; he couldn't recollect anything else. And yet because Brown said three times, "I don't remember," they would have you condemn him as trying to tell you a lie. They called him a liar. Mr. Gilmore, according to his principles of psychology, said there were just three kinds of liars, that Brown belonged to the third class, and called him a liar in so many words. I differ from most people about that. I don't want a man to call me a liar, and I don't believe it would be very safe for him if he did, and I, myself, shall not call any man a liar. It does not lower a man in my estimation, and particularly a witness who has been sworn to tell the truth, no matter who he is, or on what side of the case he is testifying for counsel to call him a liar. It does not raise the counsel in my estimation one iota, whoever that counsel may be. There is no room for such an accusation as that in this world, unless a man wants to fight. There are places if a man lied to you, or about you, you can tell him of it, but it is out of place in the court room, or when applied to a witness anywhere, because, here counsel are protected by the court and its officers, and he should not take advantage of his privileges.

Brown never lied in a single detail. The most unfair cross-examination to which I have ever listened was that of Brown. Mr. Burges asked him, "didn't you swear down there that it was Mr. Baer that came down after you and took you up to Mr. Wootton?" "Yes." "Was that true?" "No." No chance to explain, because they put the questions to him, one right after the other like a machine gun; one question right after another and never gave the witness time to answer. "Didn't you say that?" "Yes." "Didn't you state that a dozen times down there in answer to this question," and reads it. "Didn't you say Baer did this?" "Yes." "Didn't you say Baer did that?" "Yes." "Didn't you say that Baer did that?" "Yes." "And it wasn't

so?" "No." Now was that fair? He told you afterwards that the man that came down after him and took him down there and said to Wootton, "Is this the man you want?" was Baer, he had been told that his name was Baer. He found out afterwards that his name was Smock. He found out and explained it afterwards. Now where is there any lie about that? Might he not be mistaken? Might you not be mistaken under the same circumstances and be honest in it, be truthful in your statement? Is it necessarily a lie to be honestly mistaken? Then Mr. Burges asked: "Immediately prior to 12th of July, 1912, you were engaged in an effort to run Mr. Wootton out of business, were you not?" "So far as I remember it is not true. So far as I know now." "Well, could you have been engaged in that business without knowing it?" "No sir." Now the evidence is that Brown, who belonged to the American Federation of Labor, was appointed on the grievance committee that had declared Wootton unfair to organized labor, and Brown was appointed to notify him of the action of that committee. That was all Brown ever did. Now by a play of words, counsel were enabled to twist that around to suit their purpose. They go to a man who was formerly connected with the same organization and notify him that his place has been declared unfair to labor. That didn't mean they were going to burn him up; that they were going to chase him out of town, as counsel would have you believe; that they would blow up his place of business, or kill him, or his family; and Wootton knew that. He knew that all it meant in the world was that working men who belonged to that organization would not patronize his place of business. On the day of the deportation this man Smock or Baer, went down to where Brown was and said, "Your name is Brown, come with me," and he went up to Mr. Wootton and said, "Is that the man you want?" and Wootton said, "Yes, that is the man that declared my place unfair to labor." Brown said, "No, Harry, it was the grievance committee, not me,"—"you are a liar, get in line," and he cocked his gun against him. Did he do that? If he did, what motive

prompted that act? Was it to keep the town from being blown up and destroyed by I. W. W.'s? Was it because he was afraid that the I. W. W. organization was going to tear that town to ribbons, that there was a necessity for him to deport Brown as one of the I. W. W.? He told Brown at the time what it was for. When you come to pass on this case, let each juror ask himself the question, why was it Fred Brown was deported? What motive prompted Harry Wootton to put him in line? I tell you what his motive was. He told it to this man Smock: "He declared my place unfair to labor." "Get in line" with a cocked gun within ten inches of his stomach, trembling all over with rage. I declare and avow that Wootton according to the evidence in this case, deported Fred Brown for the sole motive of revenge. That is why Fred Brown was deported; that was the motive which prompted Wootton to deport Fred Brown. Fred Brown was never seen with the I. W. W., except making notes on the picket line where he had a right to be, where other citizens were, and the citizens and pickets were mixed up there, two or three witnesses testified, until you could hardly tell them apart. Even if you were picketing, that was no crime, as the Court has told you. That is the only evidence in the world against Brown, except they say that Brown went voluntarily to Chicago and testified for Bill Haywood. Bill Haywood was indicted in the United States Court. A subpoena issued from the office of the Clerk of the Superior Court of Cochise County, Arizona, is void beyond the confines of this State, but a subpoena issued from the United States Court at Chicago to a witness in this State is binding anywhere within the boundaries of the United States; the Philippines or anywhere else, any place where the Flag waves, and the witness who is summoned in obedience to such summons has got to go. A subpoena was issued to Fred Brown in Chicago. Suppose he did go, suppose there had been no subpoena. Suppose he had volunteered to go. How does that effect his credibility as a witness? Would that give Harry Wootton the right to deport him because he appeared as a wit-

ness for Bill Haywood? The question came up, did he have anything to do with the strike at Bisbee? For some reason they wanted Brown to testify about what occurred over there at Bisbee in the Haywood trial. Brown was not at the I. W. W. hall when the strike was called. You have to try the issue whether Brown went voluntarily or forcibly. They have attempted to make you believe that Brown could have gotten out of the line. The Court said in its instructions that if Brown failed to accept the invitation to get out of line because he was afraid of conditions not brought about by himself he would still have been taken forcibly. Who brought about the conditions that prevailed in the Warren District? Men with bloody heads—without their shirts—in nothing but their underclothes, men with no socks on—not given time to dress; beaten over the head, as one man testified here, that one gunman boasted of his pick handle with blood on it, and one of the gunmen said, "I soaked one fellow's head," and was laughing about it. Now, who brought about those conditions? I repeat Brown didn't do it. Did Harry Wootton do it? Yes, Harry Wootton did it. The Court tells you that he did if he was there aiding or abetting any one else who did it.

Our statute changes the common law and provides that accessories are abolished, that everybody who is concerned in, aids, abets or in any other manner is concerned in the commission of a crime is a principal; Wootton did not have to take Brown and put him in line as he did do, in order to be guilty as a principal, but became responsible if he was acting there in any capacity that day, as a guard, or in any other capacity. If he had any connection with the deportation of Brown, he is guilty.

Is the defendant guilty? He is guilty unless Brown voluntarily went out of the state. There is no question; he admitted himself his connection with putting Brown in the ring; that he marched down with the column as a guard. They took him from there down to the park. Brown tells you that he didn't see him any more until he got on the car and then he saw him standing there.

The defense would have you believe Brown was the worst character that ever was in this country; a man of such character that he should have been deported along with the other men. Where is there anything attacking Brown's character except statements of counsel? Where is there one scintilla of evidence against his character? The fact that Gompers appointed him his agent to organize that American Federation of Labor vouches for his character. Homan said "I roomed with him. I know he fought the I. W. W. continually. I know he was connected with the "Square Dealer," the object of the publication of which was to fight the I. W. W. organization." Every witness that testified on the subject told you the same identical story about Brown. Yet counsel try to make you believe that Brown was an I. W. W. and should have been deported; that Harry Wootton thought he was an I. W. W.

The main point in this case, we come to now. They would have you believe that if Wootton saw him there, or saw any act of his, whether he knew he was an I. W. W., or a sympathizer with them or not, if it was apparent to him, it was all right to deport. That is not the law. The Court in its instructions tells you positively it is not. He must have known. The law of necessity does not extend that far, and the Court so held. In this case there is nothing in evidence to show any right growing out of any regular process of law to transport Fred Brown from Arizona to New Mexico, and hence the offense is completely proven in this case.

"So far then as the substance of the crime is concerned, the things necessary to be proven by the state are that Fred W. Brown was actually taken and carried from the State of Arizona into the State of New Mexico, and that such taking and carrying was forcible."

"Nor can the plea of necessity be invoked to justify the invasion of the rights of those who were not responsible for the creation of the condition, if such existed, that either did or reasonably appeared to create a situation of imminent and threatened peril."

Or that was apparent. The condition was what was to be apparent; not Brown's connection with it. The condition of imminent peril must be apparent. But Gilmore would

have you believe that it was Brown's connection with the I. W. W. that must have been apparent; by a play of words he has sought to misconstrue that instruction, and that is what I am calling your attention to. That is what I am complaining of on the part of Mr. Gilmore. He would have you believe that that language referred to Brown's being up there on that day, its being apparent to Wootton that Brown was there aiding and abetting the strikers, if it was apparent, it was all right to deport him. The Court instructed you the word "apparent" as used by the Court referred to the conditions that existed at Bisbee and not to Brown at all. Counsel can misconstrue the rulings of the court and have you believe that it was necessary, that Harry Wootton, the defendant, was justified in this case if he believed it or it was apparent to him that Brown was one of the strikers. That Brown was an I. W. W.; that if it was apparent to him that Brown had done something there for which he should be deported, that he was justified. But the Court tells you that that is not the law, that necessity does not extend to that unless they produce those conditions that were apparent to him, the apparent conditions. Was Fred Brown responsible for those conditions? He fought those conditions; he fought the I. W. W.; he helped run a penny paper there that was antagonistic, whose very basic principles opposed the I. W. W. He organized the American Federation of Labor lodges or societies or brotherhoods there and Mr. Pennock had gone to him and asked him to organize the blacksmiths after the strike was called.

This is the next question. Did Brown refuse to get out of the ball park and, if he did, did those conditions exist that the Court tells you in its instructions which would excuse him from getting out and still make his deportation out of the state forcible? Did Brown do anything there that relieved Wootton from answering for his kidnaping him and taking him out of the state? Brown had no knowledge that he was to be removed from Arizona into New Mexico at the time when the opportunity was given him to withdraw from the body of men held by those conducting

the so-called deportation, but believed in good faith that he had been merely arrested upon a charge of some criminal offense and that he would be given a hearing—a trial in the county. Don't get the two propositions mixed. One lets him out without his believing anything except that it was dangerous to leave the ball park, that is all; the other is a separate and distinct proposition: if he didn't know where he was going; if he believed he was going to be put in that park and kept there until some charge was preferred against him in some kind of court and that then he would be tried, you should consider that in determining whether he went voluntarily or not, because if he did so believe he could not go out of the State voluntarily, if he didn't know where he was going at the time he refused to go out of the park. That is common sense and the Court so tells you. The Court says that you should take the fact as to whether Brown knew when they put him in the park what they were going to do with him into consideration in determining whether he went voluntarily or not. Did he go voluntarily? I am arguing this from every standpoint, there is no viewpoint of this case that you can follow, and follow correctly under the instructions of the court, that will justify you in finding the defendant not guilty.

The Court has told you "necessity does not extend to a man that did not help bring about the conditions that produced the necessity." The law of necessity does not excuse Wootton for deporting Brown unless Brown helped bring on those conditions. I have shown you that he did not help bring on the conditions. To the contrary I have shown you that he fought those conditions and fought them honestly and sincerely, and that he was acting in the interest of the American Federation of Labor which opposed them, and was always their avowed enemy and is today. You heard the language used by the I. W. W. writer quoted here. That shows what they thought of Gompers and the American Federation of Labor. They slander him and abuse him in that very literature that they read here before you, and they slander and abuse the organization known as the Amer-

ican Federation of Labor, of which Gompers is the head. That literature itself shows that Brown was not an I. W. W. Did Brown know where they were going to take him before the train got there when he says, "No, they put me in here, and I will stay with them—with my people. These fellows that you put in here with me, I will stay with them?" Was that going voluntarily out of the state? Did he go voluntarily out of the state because he chose to stay at the park for trial as he thought he would be tried, as he had every reason to believe he would be tried under the proclamation of Harry Wheeler? No one had ever been deported out of this county before. Why would he think they were going to deport him? Until the train came in it was kept a secret. Gentlemen, I have shown you that there is no way out of a verdict of guilty in this case. There is no way of escape on this earth, in the light of the evidence and under the instructions of the Court, for the defendant, Wootton, none at all. There was no necessity for the deportation of Fred Brown. Necessity cannot help him. He is not protected by the law of necessity because they have not shown that Brown produced the conditions that justified the necessity. Apparent necessity, mark you, is not enough. It must be an actual, real necessity.

Brown was taken out of the state; that is admitted. The Court tells you it is proven conclusively in this case, and that the only question is whether he was taken forcibly or did he go voluntarily. Let us pause long enough to examine the conditions there and why he didn't get out of line. I asked Isaacson why he didn't get out and he said he was afraid to, that he saw men with their heads bound up, men bleeding, men shirtless, men sockless there. Just transport yourselves back to July the 12th, 1917, gentlemen, in the town of Bisbee, between the steep, barren hillsides. This deportation occurs and they go down to the park and the park is surrounded by a high fence. You see men thrown into line; you see them dragged out of houses and thrown into the line, and you hear men boasting of mellowing their heads with a pick handle, you see them bleed-

ing; with blood all over their clothes, their faces bloody; you are surrounded by those conditions; you are a one-armed man, a young man, one-armed, and you are asked to get out. Pitz tried to get Brown out at the beginning and the defendant prevented it and threatened to put him in also. Now, do you think that he was going to try it again under those conditions, with hundreds of men with rifles, armed men all around him? Do you think he should try it again, he, a cripple, a one-armed man who had been put in there and had been threatened, had not been allowed to get out when his friend Walter Pitz interceded for him, didn't know where they were going to take him, believing that he was going to have a trial, as the others believed? Was it unreasonable for him to say under those circumstances, "No, I will stay here?" Wouldn't you have done it?

I have spent more time on that one point than I perhaps ought to have, but I consider that the turning point in this case. On that hangs the fate of Wootton. On that hangs the fate of this country, the upholding of the laws of this country, the maintaining of the laws of this country. In the last analysis the juries are the supporters of the destiny of any country. The prosecuting attorney may institute criminal proceedings and prosecute those charged with crime vigorously, but unless the jurors of the country uphold the laws, crime will prevail, criminals will violate the laws, people will take the law into their own hands, and in the last analysis, I repeat, the destiny of the country is in the hands of the jurors of the country, and it is for you to uphold the law—you are the judges. You hear frequently, "I don't see why the county attorney don't do something with the criminals of the county, bootleggers all over the county and they turn them loose; I don't know why there are so many criminals in this county." The sheriff goes out and does his duty; he arrests the man; he gets the witnesses here; the county attorney prosecutes him, and if the jury turns him loose the sheriff's office and county attorney's office gets the credit for it. Is that not true? Is

that not common sense. The peace and safety, the lives and property of the country is in the final analysis, with the jurors of this county. If we are to have a law-abiding, safe community in which to live, if conditions are to be safe, property and life safe, if they are to be protected, it is for the jurors of this county to say so by their verdicts.

I know there is not a man on the jury, that hasn't heard that you can't convict the corporations for deporting those men. That spirit is abroad in the land, gentlemen, as surely as you sit where you do, that there is one law for the rich and another for the poor. It is for you men to dispel that belief. I have given you the opportunity to do so. Counsel told you in his closing argument that a man never becomes a criminal in a moment. That is not true, according to history. Eugene Aram, whose name has been immortalized by Bulwer Lytton, in order to get money with which to experiment in his laboratory, killed an old man and hid his body in a cave. Years afterward he went back, an old man; and several children were playing there, and he saw the children go into the cave and when they came out he called them up to him and told them that at one time a man was murdered and put in that cave, and some of them went home and told their parents, and they remembered an old man disappearing many years before and they went into the cave and dug up the skeleton of the old man, and they convicted and hung Eugene Aram as high as Hamaan. That was his first and only crime. Dr. Webster of Cambridge University, professor of chemistry in Cambridge University, owed Dr. Parkman, another professor in that same college, a debt, and Parkman was dunning him for his money, and Webster wrote Parkman a note and had him come down to the college at an unusual hour and struck him on the head with a hammer and killed him, and then he undertook to destroy the body of Dr. Parkman with acids, and he succeeded in destroying all except a set of false teeth, which was afterward found in an ash barrel by the janitor, and which gave him away. They tried him and hung him. He was a man of the highest standing in the

community; an Elder in the Presbyterian Church. That was his first crime. The Governor refused to pardon him and on the gallows he admitted his guilt and confessed all. These are not isolated cases. The history of crime is replete with similar instances. The human mind is a strange thing. You cannot look down into the brain and tell what is taking place. It is not true that criminals are never made in a moment; temptations come in a moment and men yield to those temptations in the moment of temptation.

Gentlemen, I have given you the opportunity to demonstrate to the public, that the law is no respecter of persons, however respectable a man may be, when he comes before a jury, an American jury, under the instructions of the Court, where the evidence justifies a verdict, there is no excuse for not applying the law. If you let a man off on account of his respectability, or on account of his standing in the community, or on account of his wealth, if jurors do these things, what occurs? There is nothing rankles so much in the human heart as to believe that you have been imposed upon and that the law does not protect you. Eleven hundred and eighty-six men, working men, who labored, transformed Bisbee from a barren mountain side; whose muscle, whose time, whose lives went into the development of that District and made it what it is—it was not money that did it, that transformed those mountains of copper into dollars or that built that populous city; it was the time, the muscle, the energy, the lives of the working men of that community that did it. Eleven hundred and eighty-six laboring men were deported from the Warren district into the State of New Mexico, on the 12th day of July, 1917, and one man comes here today and asks redress at your hands. He had nothing to do with that trouble; he didn't produce those conditions, whatever they might have been. He wants the law enforced so that other men will in the future be protected in their constitutional rights.

Gentlemen, on the 12th day of July, 1917, the most shameful disregard of constitutional liberty, constitutional guaranties and constitutional rights occurred in the Warren

District, in this county—eleven hundred and eighty-six miners and working men were brutally dragged from their homes, many of them from their families, naked, clad only in their night clothes—unlawfully and feloniously beaten with pick-handles, pistols and guns over their heads, until their bodies were covered with blood—denied the privilege of kissing their wives and children goodbye—driven to the Warren ball park and herded like beasts, and from there afterwards loaded like cattle into cattle cars which were rushed across the county and into State of New Mexico, and there left wounded, bruised and bleeding on the desert's burning sands beneath July's blistering sun without shade or shelter, without food, or the money with which to purchase food if it were obtainable. Denied the right or opportunity to give that Grand Hailing Sign of every American citizen when in distress, "Bring Zenus the lawyer"—with no opportunity to consult an attorney or to apply to the Courts, which were at the time functioning, for writs of *habeas corpus*—accused of no crime, yet stripped of every constitutional guarantee, right and privilege; denied the right to demand a trial by jury, and the right to plead "not guilty." Such was the crime committed by the defendant Wootton and his confederates on that day—a crime which shook the very foundation of this government, and threatens to wreck, ruin and destroy the last vestige of constitutional government and those sacred principles upon which it is founded. The key to the situation was work. It was asked of every man, not are you an I. W. W., not are you a Wobbly, not are you a stranger sojourning in this city,— "Are you at work?" Copper was too valuable to permit men to stop work in those mines. It was the value of that copper, which Mr. Nottman tells you was 29c a pound, higher than it ever was known in the District—that was the key to the situation—copper, the high price of copper. The law of Necessity—the fear of I. W. W.ism were afterwards a defense conjured up by the necromancy of counsel learned in the law. When the men returned, the I. W. W.'s or anyone else, to the district, they were asked

“Will you go back to work.” If they said “Yes,” all right; if they said “No,” get out of this District was the mandate of that Kangaroo Court. Is that not true? Now you all know that is true. You all know that the high price of copper coupled with the fact that the miners were quitting work, caused that deportation. The companies could not afford to have the working men strike when copper was so high, and they were determined not to grant the demands of the strikers. Hence the deportation. Now that was the condition in Bisbee. That caused the violation of all of those constitutional rights—the right of trial by jury, the right to say, “I am not guilty as an American citizen.” The most horrible condition of which man can conceive is for an American born and raised and taught Americanism from his infancy to be denied the privilege of a trial by jury. That privilege was wrung from King John at Runnymede by Bishop Langton, and the English barons—and the Magna Charta was the result. Trial by jury has been the privilege of English speaking people the world over from that day. Tell me that this is not an important case! Tell me that you are going to uphold the open and notorious violation of the most sacred right that is vouchsafed by the constitution of your country and your state! I do not believe that a jury can be found in the confines of this county but will say that every man who aided and abetted in the deportation of those men which resulted in a refusal of those constitutional liberties should be punished. Better perish Bisbee, better perish the Warren District, than the violation of those sacred rights.

You remember the old story about the boy at the dike. When a leak appeared the boy ran his arm into the crevasse and held it there until help came, and in the meantime, he was nearly frozen. That boy is immortalized. Poets have sung his praises. Grain by grain the earth would be removed by that water. Lap by lap the ocean waves beat upon the shore and cut away its banks until the whole ocean beds have been changed. Scientists tell us it is changing so much every year on that account. Inch by inch the tiger

creeps on its prey. Little by little mountains disintegrate and wash down into the valleys and the mountain is destroyed. Do not, I beseech you, do not allow the first move to be made against the constitutional liberties of which we are so proud. Little by little they may be removed, started here in this courthouse at Tombstone. And where will it end? Lap by lap, step by step, little by little, the precious liberties of our people are taken from them. I defy you to show me a single instance in all history, from the dawn of time, where the liberties of a people have been wrested from them at one fell stroke—one step—one encroachment made; the next step a little more, the next step just a little more, and the first thing you know, we have no liberties at all, unless the juries of the country uphold constitutional privileges. Say to the officers and everybody else, "Proceed by legal methods to redress your wrongs." I ask "Do you believe that the sheriff has a right to take the law into his own hands? Do you believe he has the authority to permit others to take the law into their own hands? Every one of you that I examined, I asked that question, and you answered "No." Now the Court has told you the sheriff question is out of this case, that you cannot consider anything that Harry Wheeler did as a sheriff, or anything that his deputies did there. He acted there as an individual. Harry Wheeler was not the sheriff so far as this deportation is concerned. His deputies, however numerous they may have been, not one single one of them was a deputy or acted as a deputy and you are not to consider them as such. The Court in its instructions tells you that the Doctrine of Self-defense does not apply in this case—that there are but two defenses available for the defendant in this case—the law of Necessity, as defined and limited in the Court's instructions and the fact, if fact it be, that Fred Brown went voluntarily out of the state and was not taken out of the state forcibly. Are you going to allow the very foundation, the basic principles upon which this republic is founded, to be destroyed, annihilated, trampled upon, desecrated by men, however respectable they may be? Let the decree go

forth from this court-room by your verdict, gentlemen, that sheriffs acting either individually or by a posse shall keep within the law. If laws are violated, the violators must be proceeded against by legal process. Let that decree go forth and you will do more to kill I. W. Wism than ten thousand deputies will do. Where is I. W. Wism born? Where is Bolshevism born? Where is anarchy born? Not back in the darkness of archaic ages; not in ignorance; it is not a child of ignorance or of superstition. It is the child, the legitimate, the natural child of tyranny and oppression. Where did it originate? In Russia, where the word "Czar" had become synonymous, the world over, with tyranny and oppression. That is where the theories of Marx found fertile soil. That is where nihilism started; that is where bolshevism began; and that is where I. W. Wism began, through tyranny and oppression. Taking men out of their homes without process of law, denying them trials by jury, that rankles in the human heart. No man has any respect for a law that does not protect him. I invoke the protection of law in behalf of every man who was deported at Bisbee and I want you to let the world know by your verdict that you will uphold the law, for the world is watching you. It has been said that "the world is a stage and all the men and women are the players." This is the stage and you are the players. The stage is set. In a few moments the curtain will fall. Act well your parts for there the honor lies. Uphold the principles of constitutional liberty and of legal process. Let the world know that there is no distinction between men—that the rich and the poor will be accorded the same treatment at the hands of a jury of Cochise County. Do that and you will have done more to kill anarchy and I. W. Wism than deportations, mob law, tyranny and oppression can ever do.

THE VERDICT.

April 30.

The Jury retired and in an hour returned into Court with the following verdict:

We, the Jury duly empaneled and sworn in the above entitled action, upon our oaths, do find the Defendant not guilty.

J. O. CALHOUN, *Foreman*.¹⁰

After the verdict all the jurors were interviewed by newspaper reporters to whom they stated their speedy and certain decision in favor of the actions of the citizens of Bisbee. The foreman said: "The jury deliberated but fifteen minutes and agreed to their verdict on the first ballot. No man could listen to the evidence adduced during the trial without feeling that the people of Bisbee were in imminent danger and that if their fears were ungrounded, yet they were apparently real and pressing." Another juror said: "Behind the presentation of the evidence in the Wootton case and regardless of the fact that F. W. Brown had elected to be deported, the members of the jury saw that the necessity for the deportation existed. This could not be ignored. The testimony of the witnesses, not only for the defense but also for the prosecution, showed conclusively that Bisbee had become a volcano, liable to burst into eruption without a minute's warning."

¹⁰ Since they were sworn in and until they were discharged the jurors were practically prisoners, continually under the guard of Court bailiffs, not because they were deemed unworthy of trust, but primarily to prevent them from talking with persons interested in either side of the case or from coming in contact with anything that might cause them to unconsciously form an opinion regarding the case.

Their mail, their newspapers, their telephone calls—in fact everything they saw, said or did, was censored. The hardest periods for them were the frequent recesses and adjournments while legal arguments were being made as to what evidence would be proper for them to hear.

Their principal means of "dissipation" during the trial was the motion picture theatre. Almost every night a section of seats was set aside for the jury and when the audience was seated the twelve men who decided Wootton's fate would march in and take their seats in silence. In the daytime the twelve men sat in the jury-box in the court-room, in the late afternoon they swapped stories and argued politics in it, and at night after the theatre they pulled out their cots, made up their bunks army fashion and slept in them.

Another said: "When 1800 men, none of whom had been criminal before, none of whom had been criminal since, arose on the morning of July 12, 1917, to deport more than 1100 of their neighbors, there was a reason behind it, and that reason the jurors could not overlook."

Another said: "The evidence showed us conclusively that the threats of the strikers were not merely idle boasts and the deportation prevented destruction of property and loss of life in the district." Another said: "The evidence showed, in my opinion, that the citizens of Bisbee only beat the strikers to it by a few days."

Another said: "There could be no doubt in the mind of any reasonable man that the people of Bisbee were menaced and that they took the only way out of the danger." Another said: "I think the only regret we all had was that we could not settle all the cases with that one ballot. After hearing and considering the evidence from both sides I, for one, feel that Sheriff Wheeler and the citizens of the Warren District did what they thought was right and necessary."

Another said: "We had each cast our vote without knowing how the other fellow was voting and it certainly was a relief when the votes were checked and we found that all twelve of us had reached the same decision after hearing all the evidence and arguments of both sides. It is too bad that the one case could not have settled the whole thing." Another said: "Although I have served on three juries I had never heard of the law of necessity before, but I was convinced, after hearing all of the Wootton case, that such a law applied to the situation at Bisbee."

THE TRIAL OF WILLIAM H. WESTERVELT,
FOR THE ABDUCTION OF CHARLEY ROSS:
PHILADELPHIA, PENNSYLVANIA, 1875.

THE NARRATIVE.

On July 1, 1874, Christian Ross, a successful and respected merchant of Philadelphia, lived with his family in a handsome residence in the suburb of Germantown. His wife and one daughter were at Atlantic City and two of his children were spending their vacation in the country with their grandmother. When Mr. Ross reached home that evening he looked for his two youngest boys—Walter, aged six, and Charley, a chubby little fellow with long flaxen curls, aged four, who were constant companions and whom he usually found playing in the grounds or on the sidewalk outside the gates; but they were not to be seen. When darkness came on and they were still missing, he became alarmed, sent his servants to make inquiries among the neighbors and started to the nearest police station, when he met Walter accompanied by a gentleman who had found him in the street several miles from home.

Walter told his story, from which it appeared that a few days before two men drove by the Ross mansion in a buggy and seeing Charley and Walter playing on the sidewalk, stopped, and after giving the children some candy, engaged them in conversation. On the afternoon of July 1 they again stopped and Charley asked them for a ride and to buy him some candy and firecrackers with which to celebrate the approaching Fourth of July. The two strangers readily agreed and Charley and Walter were taken into the wagon. The men said they would go to "Aunt Susie's" where they could procure candy and fireworks. When they had gone quite a distance they let Walter out, handed him some money and directed him to the corner store where firecrackers were sold. While he was making his purchases the kidnapers drove off

with Charley. When Walter came out of the store he cried loudly, realizing that he was left alone. Among the sympathizers who gathered about him was a Mr. Peacock who finally restored him to his father.

Before nine o'clock that night the police had been notified and the search for the missing child had begun. Next morning, accompanied by Walter, Mr. Ross drove over the route the wagon had taken the day before, but though several persons had seen the wagon pass when both boys were in it, none had observed it after Walter had left it, nor could any trace be found of the horse and wagon.^a

The newspapers next day gave great publicity to the case and there were various speculations by the detectives and the citizens as to the motives for the abduction. Some thought it was simply the act of a couple of drunken men who had probably by this time released the boy who had lost his way home; others that it was the revengeful act of a discharged servant or creditor or a personal enemy or a convict on whose jury Mr. Ross might have sat.^b Some claimed that family trouble had caused a relative to kidnap the favorite child. Others thought he had fallen into the hands of gypsies, while some even expressed the opinion that the child was being concealed by Mr. Ross himself.^c Only one person seemed prepared to believe that a child could or would be stolen for the sole object of a ransom.^d

On July 4 Mr. Ross received a poorly written, badly spelled letter posted in Philadelphia. It said:

Mr. Ros—be not uneasy you son churley bruster be al writ we is got him and no powers on earth can deliver out of our hand—you will have to pay us before you git him from us—an pay us a big cent to—if you put the cops hunting for him yu is only defeeting yu own end—

^a Christian K. Ross, post p. 186; Walter Ross, post p. 196.

^b One person who answered this description was speedily hunted up but at once cleared himself of any connection with the case.

^c This was Officer Joyce. Post p. 187.

^d One man wrote to the Mayor suggesting that the grounds around Mr. Ross' house should be dug up. Another that all the rooms in his house should be searched, and the insinuation that the boy had

On July 4 an offer of reward was issued and on July 8 a second letter came in the same handwriting demanding a ransom of \$20,000 and threatening to kill Charley if the police were put on the trail or the money not paid, and directing that if Mr. Ross desired to communicate with them he should do it in the personal column of the Philadelphia Ledger, in these words: "Ros we are ready to negotiate."^e

The officials now decided that strenuous methods must be employed. Not only in Philadelphia, but throughout the country within a radius of many miles of that city a search was instituted, the like of which both as regards magnitude and thoroughness has seldom been made by American police officials. Every vessel and canal boat on the waters near by, the ferries and all vehicles of the country highways, the haunts of the criminal classes, the houses of vice and even private houses in the suspected district were searched. Descriptive handbills were posted, the railroad stations were watched and the newspapers of the land soon spread the news across the continent, and within a short time the crime was the first subject of discussion all over the continent and the name of Charley Ross became a household word.

Not only the police authorities but private citizens joined in the search; they offered through Mayor Stokley, of Philadelphia, a reward of \$20,000 for the discovery of the miscreants, and one man, a stranger to the father, stated his

been stolen by his own father being repeated several times, Mr. Ross finally prosecuted the proprietors of one of them, who confessed the falsity of the charge and was fined \$1000. "The Father's Story," p. 94.

^e Post p. 188.

^f Stokley, William Strumburg. Assessor of Second Penn. district, 1871. Mayor of Philadelphia, 1872-1881; term of office notable for reforms, but towards end political corruption crept in, in spite of his efforts. Refused in 1881 to declare himself in favor of the "Committee of one hundred" and was thereby defeated for re-election. Appointed by new mayor in charge of public safety. See Scharf and Westcott, History of Phila., 1884; *Public Ledger* (Phila.) 1871, 1872; *Philadelphia Press*, 1871, 1872. All of the local histories and political histories of Philadelphia have very little to say about Stokley. Even the newspapers announcing his election and inauguration omit any biographical data.

The *Public Ledger*, Nov. 4, 1871, under heading News from Wash-

willingness to pay the sum demanded by the kidnapers out of his own pocket.^g

During the weeks of negotiations with the criminals letters containing suggestions and reporting suspicious people and children that were said to resemble Charley Ross poured in from all parts of the country. Daily was the father advised of some child supposed to be the missing boy. Some were so encouraging as to excite his hopes and the disappointment that followed was proportionally great. In two years Mr. Ross personally, or through one of his agents or the police, investigated more than three hundred cases of this kind, not only in the United States, but in Canada, England and Germany.

To return to the narrative. On July 7 Mr. Ross replied as directed and on the same day another letter was mailed to him in which he was told to state in a personal, whether or not he would come to terms. It was then decided to continue answering letters and to frame the letters so as to necessitate further correspondence, as it was hoped that eventually something would be revealed by which the child could be traced, or that a blunder would be committed which would lead to the detection of the writer. Accordingly the answer to the last letter was: "Ros will come to terms to the best of his ability." The correspondence leading no nearer to the discovery of the child after numerous letters from the kidnapers and personals in the newspapers from the father, the parents became desperate and ready to make any sacrifice. So on July 22 the father informed the kidnapers that he would agree to their

ington says: "Mayor-elect Wm. S. Stokley called on Sec. Boutwell to resign post of Assessor of the Second Penna. district." The *Phila. Press*, Oct., 1871, in an editorial speaks of him as a man of the people who did not need to lean on any long line of ancestors.

^g This offer was refused by the father who says in his book (p 89), "With peculiar pleasure do I recall this magnanimous act. In the hour of my deepest darkness the light of such practical human sympathy was doubly so. In the deep depravity and selfishness of wicked men, my child was stolen; in the kindly sympathy of a stranger was found a heart large enough and a hand generous enough, voluntarily to meet the utmost demands."

terms in every particular, and on the 30th they wrote Mr. Ross that he must put \$20,000 in small bills in a white valise and take the train leaving at midnight for New York. He was to stand on the rear platform of the last car. At New York he must take the morning train for Albany. He was to be on the alert and if he saw a torch and a white flag waved at night-time near the track or a white flag alone in the day-time, he must throw the valise instantly and if it was found to contain the money demanded the child would be restored to its home within ten hours.

Mr. Ross procured the valise and proceeded on the journey, but instead of the \$20,000 the valise contained a letter in which Mr. Ross stated that he would not pay the money until he saw the child before him. He took his position on the rear car and made the entire nerve-racking journey, but seeing no signal he returned home, where he found a letter from them censuring him for not making the trip. It turned out that a newspaper had erroneously stated that Ross had gone in another direction with some officers to follow up a clue and believing this information to be authentic the kidnapers abandoned their plans. Communications again passed back and forth, but Mr. Ross now stated positively that the payment of money and the delivery of the child must be simultaneous.

On November 7 a letter was received which instructed Mr. Ross to send somebody to New York with the necessary money and to announce two days in advance through the personal column of the *New York Herald* when they were coming, the personal to read: "Saul of Tarsus" and name the hotel. They also warned Ross to instruct his agents not to leave their room in the hotel for an instant that day. On November 15 the following personal appeared in the *New York Herald*: "Saul of Tarsus, Fifth Avenue Hotel: Wednesday, 18th, all day." On the 17th Mrs. Ross' brother and nephew left with the money and carried out the instructions, but no one appeared to claim it. This was the last letter ever received.

On August 2 Chief of Police Walling of New York telegraphed to Philadelphia for the original letters of the kidnapers, adding that he had reliable information as to their identity. Captain Heins of the Philadelphia police proceeded to New York with the necessary papers and Chief Walling's informer identified the writing as that of William Mosher. He said he was his brother and a member of a gang of criminals. He stated that in April, 1874, William Mosher and Joseph Douglas endeavored to persuade him to participate in the kidnaping of one of the Vanderbilt children while the child was playing on the lawn surrounding the family residence at Long Island. The child was to be held until a ransom of \$50,000 was obtained and the informer's part of the plot was to take the child on a small launch and keep it in seclusion until the money was received; but he declined to enter into the conspiracy.

It was then learned that Mosher was a boat builder by trade and a fugitive from justice, on a charge of burglary. After his escape he and Douglas manufactured a moth preventive and they traveled about the country with a horse and wagon. At the time of the kidnaping he resided with his wife and children in Philadelphia, and Douglas lived in the same house.

On August 19 Douglas, Mosher and his family moved to New York where Mosher had a brother-in-law named Westervelt, who was at one time a police officer but had been dismissed from the force. Westervelt was at once suspected of being in the plot and was arrested. But when questioned by the police he denied all knowledge of it but agreed to assist in the arrest of the criminals who had now disappeared from their homes and their usual haunts. But nothing came of this, as Westervelt was, it was found out later, engaged in protecting the men, instead of assisting the authorities.

The next act of this drama is staged at Bay Ridge, a village on New York Bay, the summer home of wealthy New Yorkers. There lived Mr. I. H. Van Brunt who occupied

his house permanently and next to him lived, in the summer only, his brother Judge Van Brunt of the Supreme Court. During the winter the Judge's house was empty, his custodian living in a cottage near by, but there was a burglar alarm which communicated with Mr. Van Brunt's residence. At two o'clock on the morning of December 14, 1874, the alarm bell rang violently arousing the family of the Judge's brother. His son, Albert, dressed in haste and going outside saw that there were burglars in the house. He aroused the Judge's custodian, their own man-servant and his father, who had meanwhile procured shotguns and revolvers, and the four went to the house, two of them being stationed at the front entrance and two at the rear. They waited patiently for nearly an hour. Finally the dark forms of two men were seen as they crept up out of the cellar at the rear. Mr. Van Brunt, Sr. called, "Halt", but the response was two pistol shots which fortunately missed. Mr. Van Brunt then poured the contents of his shotgun into the foremost man, who fell with a cry of agony. Number two ran into the arms of the son and the result was that he dropped dead from a bullet through the body. The noise aroused the entire neighborhood and when the first burglar realized that he had but a few moments to live he called for a drink of water and made the following statement:

"Men, I won't lie to you. My name is Joseph Douglas and the man over there is William Mosher; he lives in New York and I have no home. I am a single man and have no relatives except a brother and sister who I have not seen for twelve years. Mosher is married and has four children. I have forty dollars in my pocket that I made honestly. Bury me with that. I am dying now and it's no use lying. Mosher and I stole Charley Ross."

Asked why he stole the child, he replied, "to make money." Asked who had charge of Charley Ross, he replied, "Mosher knows all about the boy, ask him." They then informed him that Mosher was dead and the latter's body

was dragged over to where Douglas was lying and a light placed near the dead man's face. He whispered, "God help his poor wife and family. Chief Walling knows all about us and now he has us. The child will be returned home safe and sound in a few days." He then became unconscious and fifteen minutes afterwards he was dead. A detective who had known Mosher and Douglas identified the bodies as did Walter Ross who at once recognized Mosher as the man who drove the wagon and Douglas as the one who gave them candy. And Peter Callahan who saw the children in the wagon with the men, also identified the remains. Mrs. Mosher was found and while she admitted that she was aware of the fact that her husband had kidnaped Charley Ross, she insisted that she did not know where he was concealed.

Mr. Ross then issued a circular wherein he stated that as he was positive that the leaders in the kidnaping conspiracy had been killed, he had no desire to prosecute the parties who then had his child in custody and that he would give \$5,000 as a reward to any person who would restore his boy and no questions would be asked.

On February 25, 1875, the Legislature of Pennsylvania passed a law defining the offence of kidnaping and fixing the punishment at a fine not to exceed \$1,000 and solitary confinement not to exceed 25 years, but it was specially provided that if any persons then having any kidnaped child in their possession, returned such child to the most accessible sheriff or magistrate previous to March 25, 1875, such persons would be immune from punishment.

The authorities of both New York and Pennsylvania being of opinion that Westervelt was connected with the plot, he was taken to Philadelphia and indicted for abducting and concealing the child from his parents, and conspiracy in protecting the two men in giving them information of the whereabouts and aiding in the detention of the child in this way. Though he stoutly maintained that he had never seen Charley Ross and did not know where he was hidden, yet the proof was clear that he was the constant companion of

both Mosher and Douglas, both before and after the day of the abduction, that he lied to the Chief of Police again and again, telling him that he did not know where they were, when he had seen them and spoken to them within a few hours. He was convicted of the conspiracy and sentenced to imprisonment for seven years in solitary confinement at hard labor.

But little Charley Ross was never found and nothing has ever been learned of his fate.

THE TRIAL.¹

*In the Court of Quarter Sessions, Philadelphia,
Pennsylvania, September, 1875.*

HON. THOMAS R. ELCOCK,² Judge.

August 30.

William H. Westervelt had been previously indicted for abducting, detaining and concealing an infant, Charles Brewster Ross, from his parents and for conspiring with William Mosher to commit those acts. The bill contained five counts, the first two covering the abduction and concealing; the last three charging a conspiracy to abduct and

¹ *Bibliography.* Life, trial and conviction of William H. Westervelt for the abduction of little Charley Ross. The tragic death of the burglars, Mosher and Douglass (on Long Island, N. Y.), who were implicated in abducting the poor little fellow. The confession. The whole case. The trial in full. Philadelphia: Published by Barclay & Co., No. 21 North Seventh street. 1875.

"The Father's Story of Charley Ross, the Kidnaped Child." By Christian K. Ross, of Germantown, Philadelphia. John E. Potter and Company, No. 617 Sansom St., Philadelphia.

"Celebrated Criminal Cases of America," by T. S. Duke, San Francisco, Cal., 1910.

² ELCOCK, THOMAS ROBERT (1840-1908). Born Philadelphia. Educated in public schools. Studied law with F. Carroll Brewster and admitted to Bar 1859. Judge Court of Common Pleas 1874-1884. At the opening of the Civil war, he organized a company of which he became Captain and saw much active service. See Bench and Bar of Phila. (Martin J. T.) 1883.

conceal him and to extort money by means of threatening letters.

*Henry S. Hagert*³ and *Furman Sheppard*⁴, District Attorney for the Commonwealth. *Joseph T. Ford*⁵ and *I. Newton Brown* for the Prisoner.

The Prisoner was arraigned.

Mr. Ford: The prisoner's wife has come here voluntarily, having been jointly indicted with him, and she asks to be arraigned and stand trial with him.

Mr. Hagert: The Commonwealth proposes to try only William Westervelt now. Mary Westervelt will be disposed of whenever the District Attorney sees fit.

The Prisoner pleaded *not guilty* and a jury was impaneled and sworn.

Mr. Hagert: In July, 1874, the citizens of Philadelphia were startled at the intelligence that an atrocious crime had been committed in their midst, one which to the criminal annals of the city prior to that time had been unknown. The intelligence of that crime spread far and wide over the country. In the far west, in the east, in the south and north; in large cities, in small hamlets, by the way side, this story was talked of and carried with it sympathy and regret. The community was aroused and every man and woman became, as it were, detectives. I need not say that that crime was the abduction of Charles Brewster Ross. There were more than Mosher and Douglas involved in this business, there were men who took care of the boy, who moved him from place to place, who, when messages were sent telling them of approaching danger, changed the quarters and location of the boy. You will understand there were a number of things to be considered in the abducting of the boy. He had to be hid and kept out of the reach of the police force. You will understand how great was the search for this boy, how all the police force of the country was interested in his recovery; how every one supposed to have any connection with this case

³ See 3 AM. ST. TR. 308.

⁴ See 3 AM. ST. TR. 308.

⁵ FORD, JOSEPH THOMAS (1833-1903). Born and died in Philadelphia. Educated Lawrenceville, N. J. Studied law with Benjamin Gerhard and admitted to Philadelphia Bar, 1855, where he practiced until his death. He took a prominent part in the election of Lincoln and was one of the organizers of the Gray Reserve Regiment, afterwards the First Regt. Penn. Nat. Guard and became its *Adjutant* until the spring of 1862 when he became a Captain in the U. S. Army, later serving on the staff of General Doubleday and participating in the Virginia Campaign, including the battles of Fredericksburg and Antietam. He resigned his commission on account of ill health and returned to the practice of the law in which he was most successful.

was arrested and examined. You will understand that at this time when the interest was at its highest that man in the dock was standing by who could put his hand on the very men who did the deed, having them in his own house and informing them of the actions of the police and of the intentions of the authorities. If we can show you that these facts as stated are so, there can be no doubt he is just as guilty as if he had taken the boy himself; just as guilty as if he had conceived the plan of kidnaping.

THE WITNESSES FOR THE COMMONWEALTH.

Christian K. Ross: I am a merchant in Philadelphia; live on Washington Lane (German-town). On July 1, 1874, my family consisted of seven children; two of them were spending their summer vacation with their grandmother and one daughter was with her mother at Atlantic City, the latter being in poor health. Those at home were two daughters, and my sons Charles Brewster, aged four years and two months, and Walter, then about six. Their mother had told them that in two weeks she would send the girl home and they should come to her and they were looking forward to this with great pleasure.⁶

There were also in the house three female servants and the gardner. On the Saturday previous, Walter told me that a man in a wagon had just gived him and Charles some candy; he said he did not know the man and I told him to be cautious about taking things from strangers.

When I reached home about six on July 1 I was surprised to find the boys not playing as usual in my grounds or on the sidewalk. One of the servants told me they had been playing outside; I looked but could not find

them. After tea I got anxious and sent the servants to make inquiries among the neighbors but learned nothing of them. After tea I went out to look myself and one neighbor told me she had seen them pass her house in a wagon with two men. I then started to the subpolice station and had not gone far when I met a gentleman (Mr. Peacock) leading Walter by the hand, who told me he had found him on the street, lost. I asked Walter where Charley was; he was at first too frightened to reply but finally said: "Why he is all right, he's in the wagon," evidently thinking that he was the lost one and not Charley. Sent Walter home and then telegraphed to all the station houses asking if the child I described had been seen. I then, with my nephew Mr. Lewis, went to the Central Station in Philadelphia where Capt. Joyce seemed certain that the boy would be found during the night. Then Lewis and I went to the place where Walter was found, made inquiries, but could learn nothing. It was now 3 a. m. and as the street cars had stopped we had to walk home, about 7 miles. We reached there at 5, tired out and un-

⁶ In letter No. 6 of his abductors Charley is spoken of as fretting lest he should not get home in time for this.

nerved. Next morning I had Walter tell his story of the abduction (see his testimony post).

After that I went again to the Central Station; nothing had been learned there; they thought the men had taken the boys under the influence of liquor and were now alarmed at what they had done and would probably turn Charley loose during the day.

Forgot to say that when I met Walter with Mr. Peacock he had in his hands two packs of fire crackers and one of torpedoes and the next morning I found in his pockets some candy, a five cent piece and some coppers. I then went again to the place where Walter was found. A little girl said she had heard Walter crying on the corner and two men working on the road, who before 6 p. m. that day had seen a wagon with two men and children pass by. The proprietor of the store remembered that a boy had bought fire crackers and torpedoes that day, but supposing him to be from the neighborhood had not noticed him particularly and did not see the wagon and its occupants. Then we drove to my house, making inquiry at every hotel, tavern, watering place, feed store, livery stable. Returned home and took Walter in a wagon, told him to direct us what route was taken to get to the point where he was let out; we followed his directions and they brought us to the point where he was let out.

Then drove to the Central Station where I was closely questioned as to what motives could have prompted the act. I was asked: First, were there any

difficulties in my family relations? To this I answered, none whatever. Second, what servants were now in my employ? I gave the names and related so far as I was able, how they were obtained and expressed my belief they were not in the conspiracy. Third, what servants, male and female, had been discharged from my employ? The names were given and they were subsequently traced. The detectives, after a thorough investigation were satisfied that they were not implicated in the matter. Fourth, did I suppose that any of my creditors would be likely to do an act of this kind? To this inquiry I emphatically replied in the negative. Fifth, had I ever had a disagreement with any one which would likely cause such an act to be done out of revengeful motives? I declared that I bore no ill-will to any living person and certainly knew of no one who had any enmity against me, for I had never given cause for any such feeling. Sixth, had I served on a jury that had convicted anyone of crime? I answered, on one case years ago. The person so convicted was hunted up and cleared himself of any complicity in the case. The detectives declared there must have been some motive for the act and were utterly at a loss to even surmise what it could be.

Officer Joyce suggested that before long I would get an anonymous letter about it, which was a shrewd guess on his part. I then wrote out the following advertisement which appeared in the *Public Ledger* on July 3:

"Lost on the 1st inst., a small boy, about four years of age, light complexion and light curly

hair. A suitable reward will be paid on return to E. L. Joyce, Central Station."

I did not use my name as I did not want to alarm my wife. That morning I met at the station Mayor Stokley and Chief of Police Jones. Both of them assured me that every thing possible would be done and the Chief immediately instructed the Lieutenants to detail a sufficient number of men in citizen's dress in each district to visit and examine every livery stable, blacksmith shop and all other places where there was a possibility of the horse being kept or hired and to direct all their respective officers at the next roll-call to keep a strict watch on all suspicious persons as well as make inquiries for the child.

On July 4, we published this in all the leading Philadelphia papers:

"\$300 reward will be paid to the person returning to No. 5 N. Sixth street a small boy four years old, having long, curly flaxen hair, hazel eyes, clear, light skin and round face, dressed in a brown linen suit with short skirt, broad brimmed straw hat and laced shoes. This child was lost from Germantown on Wednesday afternoon (1st instant) between four and five o'clock."

On that day I received an anonymous letter saying that the writers had my son and I would have to pay big for him, that if I tried to get him through the police it would mean his death and that I would hear further.

That night I went to Atlantic City and told my wife and on my return received a second let-

ter demanding \$20,000 for the return of Charley, that if I did not pay it they would kill him as an example to other parents that might refuse their demands; that if a detective approached his hiding place the boy would be killed and that I should reply by putting in the *Ledger* these lines: "Ross we be ready to negotiate." (See letter No. 2, post, p. . . The following morning I put that in the *Ledger*. These letters aroused the authorities. The police were instructed to search every vessel, steam and canal boat on the rivers, to examine every suspicious place, public and private; to visit all ferries leading to New Jersey; to stop all covered vehicles passing over the various bridges; to question keepers of toll-gates in the adjoining counties and New Jersey; to keep watch on all the railroad depots day and night; to look into all barns and unoccupied houses; to go through all known haunts of the criminal classes; to examine the houses of Italians, professional beggars and all the abodes of vice; to keep watch on every person known as a criminal or to whom any suspicion was attached; and to examine anew all stables and sheds, both public and private. At a designated hour in the evening they searched all houses of ill-repute. Soon followed an order to visit every house, public and private, throughout the whole city. Descriptive hand bills were distributed all through Pennsylvania and neighboring states and very soon extended all over the country and even to Europe. The newspapers throughout the continent described the abduction in

all its details and the appearance of the lost child, and soon hundreds of thousands of people knew of my loss and the crime.

The afternoon of the publication of my reply in the *Ledger* another letter came to me which said that the only reply they would listen to was, am I willing to pay the money, if not his blood would be upon me and not them. When it became known that a large sum of money had been demanded of me, the public became excited, parents were afraid to let their children go on the streets. The abduction was the subject of conversation in homes, on the streets, in the stores and on cars all over the land; the newspapers were eagerly bought for the latest information. Many private citizens joined in the search and all the post office boxes were strictly watched.

In the *Ledger* of July 8, I replied: "Ros will come to terms to the extent of his ability" and the next day saying that all efforts of detectives would not find Charley but would only jeopardize his life, that it had cost them already \$1000 to keep him safe and they must know at once how much I would pay and I must reply as before, "Ros, I is got it and be wilin to pay it". On the 9th I replied in the *Ledger*: "Ros have not got it; am doing my best to raise it" and as no answer was made to this, on the 13th said: "Ros is got it and is willing to pay it". On the following day an answer was received saying that it was as certain as death that I must part with my money or my child, that five hours after they got the money I would get my child,

that they must have U. S. notes not larger than tens, that any false act on my part sealed his fate, and I must reply: "Ros it is redy you have my word for it" in the evening *Star*. This I did. On July 16 their 6th letter came. They had not replied earlier because they had been out in the country to see Charley who was well but fretting, afraid he would not get home in time to go to Atlantic City when his sister got back. By Saturday they would be ready for the exchange, but they must deal with me alone. No detectives; the child will be killed if any attempt is made to arrest the person who comes for the money. I am to mail the money in a small, strong box and have it ready at a moment's notice, marked "Drugs for H. H."

But Saturday came and instead of the messenger a letter was received. It spoke of articles in the newspapers proposing that citizens offer a reward, said that it would be a fatal mistake if I did not have the money when the messenger called as he would never call again, and that the excitement in the city that they could do nothing just now, are therefore not ready to settle today as they agreed, advise Mrs. Ross to have nothing to do with spiritualists and ask me to use the initials "C. R. R." instead of "Ros" after this.

"To show you that we are not deceiving you," it said, "his striped stockings are darned in two or three places," which his nurse declared to be so, and for further proof it said "ask Walter if we did not put the blanket in front of him and Charley to hide them and say we would go to

Aunt Susan's," which Walter said was so.

During this time it was arranged that detectives should be in my house all the time ready to act. On July 21 I published in the *Ledger*: "C. R. R. Money is ready. How shall I know your Agent"? On the next day came an answer which said that a statement in the *Star* says you have no faith that we will give up the child after we get your money. But we will have no use for him then and it will be to our interest to inspire other parents with confidence in us should we steal their child. They again caution me against employing the police to arrest the messenger as that would mean Charley's death.

On the 22nd Mayor Stokley issued a proclamation offering a reward of \$20,000 for the kidnapers. On July 22 I published in the *Ledger*: "C. R. R. I will agree to the terms in every particular." Then came a letter in which the exchange is postponed for a week as the moon is in the wrong quarter; the delay will

torture me but it is unavoidable and Charley will not suffer. The reward offered by the citizens will avail nothing, for they are sworn and blood bound not to betray each other. If the money does not reach them Charley will be killed, but if it is lost through their fault Charley will be restored. They invoke the vengeance of Hell if they do not keep their word and reiterate their threats if any deception is attempted. They also instruct me to change my heading in the *Ledger* from "C. R. R." to "John."

On July 21 the tenth letter came in which they notice the general search for the child in the city and say he has never been there since they took him and never will again unless I pay up, that he is within 100 miles of it but defy any one to find him. They instruct me to put the money in a white leather valise and to have it ready for whoever comes for it and to reply "John, it shall be as you desire," which I did. The next (eleventh letter) I would like to read in full (reads):

Ros yu are to take the 12 P. M. train to-night from West Philadelphia for New York it arrives at New York 5.05 A. M. take a cab at Cortland or desbrossers sts New York and ride directly to the Grand Central Station at 4 ave and 42d streets take the 8 A. M. northern express by way of Hudson river.

(Take Notice) yu are to stand on the rear car and the rear platform from the time you leave West Philadelphia depot until yu arrive at Jersey City you are then to stand on the rear platform of hudson river car from the time yu leave the Grand Central at New York until yu arrive at Albany if our agent do not meet yu before yu arrive in Albany yu will find a letter in post offis at Albany addressed to C. K. Walter, directing yu where yu are then to go.

Ros the probability is yu may not go one mile before our agent meets you, yu may go 250 miles but where it may be yu must throw the valise regardless of risks. These are the signals; if it be dark the moment the last car passes him he will exhibit a bright torch in one hand and a white flag in the other, but if it be light he will

ring a bell with one hand and a white flag in the other, the instant yu see either of these signals yu are to drop it on the track. If the cars go on we consider yu kept your word, but if they stop to arrest our agent then the child's fate is sealed. This letter ends all things in regard to the restoration of yu child."

After consultation with the de- this letter and put it in the va-
tectives and my friends I wrote lise:

Philadelphia, July 30, 1874.

Sir: Your letter of this date is received. I am anxious to end the suffering and suspense of the terrible four weeks that I have just passed through, but I am compelled to tell you that I cannot throw away twenty thousand dollars on the wild plan you suggest. It is a plan where all the chances are on your side and I have not the smallest assurance that I will ever get my dear child into my possession again. It is impossible for me to give you twenty thousand dollars (\$20,000.00) and trust to you to bring you my child at some subsequent time. I desire to act with you in good faith, but as your whole correspondence leads me to strongly suspect deception, I must insist upon having some positive, tangible proof that you have the child and that after receiving this I must in some way and at some place suggested by you, meet either you or yours and see that you have my child in my presence so that I may take him—simultaneously with your receiving the money. I shall look for a letter from you in Philadelphia in answer to this.

I have come here in response to your call with a friend (not an officer) as suggested by you in your letter of 28th instant, and in so doing have complied so far as a reasonable man can with your plan. I cannot give you one cent until I see my child before me. It is my purpose, as I have said, to act in good faith; but I must before going further receive every assurance which can possibly be given me, first, that you have the child, and second, that his delivery to me will be simultaneous with the delivery of the money to you.

I will add that the public mode I have used in compliance with your suggestions of answering your letters is not satisfactory to me, as it informs the police and everybody else of what we are doing. We must have some better mode of communication.

C. K. Ross.

With my nephew, F. D. Lewis, I left on the Pennsylvania Railroad at midnight. We stood on the back platform all the way to New York but saw no signal. We arrived there as directed and took the train the next morning and remained on the rear platform, ready to throw the valise, the whole way to Albany, where

we arrived begrimed with dust and utterly exhausted, but saw no signal. We staid there a day, found no letter at the post office and returned to Philadelphia, where we found a twelfth letter which stated that they had not kept their appointment because they had seen in a Philadelphia paper that I had gone

that day to Pottsville to see a child. That was so but it was corrected in the evening papers. They further say that to prevent further trouble in looking after children that Charley is not in possession of any woman or family, that he is well, his curls have not been cut off. In ten hours I can have the child if they get the money.

On the 3d August I replied in the *Ledger*: "John, your directions were followed but you did not keep faith. Point out some sure and less public way of communicating."

Next day their thirteenth letter came which excused their not keeping their appointment on account of the newspaper's blunder and direct that I put the money in a box and hand it to their agent and ask no questions. He will give me a symbol of which I will previously receive a facsimile, so there will be no mistake. I replied, "John: Proposition is impossible, action must be simultaneous."

On the 5th came the fourteenth letter. They say that unless I agree I will never see the child, that a simultaneous exchange is impossible as they will not run the risk of imprisonment for life. If he is not redeemed he will be killed. That others may know that they will execute their threats should they steal another child; but on account of the public feeling that has been aroused, they intimate that they will not attempt it again in this country. They once thought they might be able to effect the exchange in Canada, but find that they could be held there for robbery and extortion and be brought back to the United States. They notice

it had been suggested to give them counterfeit and marked money and add that if I attempted to do so, the child would be held until two-fold the amount had been paid to them. They mention having discovered that my circumstances are not what they supposed them to be and that they had thought of abating one-half of the amount of the ransom; but since the public had become so much interested and offered so large a reward, they will adhere to their original demand. They announce their intention of leaving the city the same night and that they will be at least 200 miles distant by the time their letter reaches me; and that they will not write to me again unless I signify that I will agree to their terms. They sneeringly advise the detectives to run out their clues, claiming that they have left no clues behind them by which they can be traced; and declare that Charley will remain where he was put on the second night after he was stolen and that he shall not starve to death, but if killed his death will be as sudden as a flash of lightning; and close the letter by informing me that hereafter any communication that I may wish to make to them shall be through the medium of the *New York Herald*.

I did not reply to this and three weeks went by before the next (the fifteenth) came which said they had seen no communication from me in the *Herald*, that they will not change their proposition, that it was fair because they must have a few hours to examine the money and return the child. They demand an immediate answer as they are going to Europe next month.

I replied asking them to name an attorney through which arrangements could be made, as my friends doubted if they really had the child. Their sixteenth letter, postmarked Roundout, said my answer saved the child. They ask me to ask Walter a number of questions as to what took place in the wagon. I did so and was convinced that they were the men that the boys rode away with. They go on to say that had not the public interfered in the business they would have lessened the sum of money fixed as the ransom; but will not now; it will be impossible to make a simultaneous exchange. I would get Charley and they might receive a bundle of paper and a chain around their necks. For these reasons they require time to make themselves secure. Charley is necessarily kept closely confined where no one could live over a year and where the light of the sun has never shone on him since the 2nd day of July. The continual cry of Charley is

to see Walter and go to Atlantic City to be with his mother. Their whole plan would be frustrated if the child should be set at liberty without the ransom being paid. As I deal with them so will they deal with me; they require an answer in the New York *Herald* with the same address of "John" and they added, "Ask Walter if we did not give Charley pieces of candy as we rode along." Walter told me that they gave his brother more candy than they did him.

I replied: "I require conclusive proof. Send clothing to any point you please and advise." In their 17th letter received next day they think the proofs they gave ought to be satisfactory, that they have seen him only 3 or 4 times since July 2 and his hair has been cut off and girls' clothes put on him. No detective has ever had the slightest trace of the place; if they ever should approach it, this would be a signal for his instant destruction. I will read the rest of the letter.

"On the night of 2d July at 11 o'clock we passed through Trenton, N. J. Charley lay in my arms asleep—after we had passed about 2 squares up bridge st Charley's hat drops off and we did not notice it until he woke up and asked for his hat we would not go back for it—you can get this hat by advertising for it there—if it is not worn out if it should be worn out you can find out who found one that night or next morning, ask one of your domestics of Mr. Ros—If Charlie did not have on the afternoon of the first of July a narrow faded pink ribbon tied around his head to keep the hair out of his eyes—If yu find this a fact which we have no doubt you wil an as it was never described in the advertisement, we think no human being could mention it but the party who took him—If this does not satisfy yu and yu friends that we have him then yu must go unsatisfied"

The nurse told me she had used a narrow pale pink ribbon as described, but though the police made a long search the hat was not found. On Sept. 14 I

answered in the N. Y. *Herald*: "Hat not found. Am ready to pay the sum, but only through an attorney. He dare not betray you. Name one anywhere." The

answer came (No. 18, dated New Haven) on Sept. 25, in which they said they had been to New Brunswick, Canada, to see if a simultaneous exchange could be made there but found it could not. I had better redeem Char-

ley regardless of what my friends tell me and when I have decided to be my own attorney and to agree to their names, I may notify them by another personal. I will read the rest of the letter.

"Mr. Ros we cannot show the child to you and we cannot give you any more proof than we have, you must accept this as the only alternative left you to ransom him or murder him for one or the other will and shall take place before many days—you as his father have been more cruel to him than we have—we told you that his place of concealment was such that no living being could find it and that it was not fit place for any one to be in the length of time he has been there we do not keep him there to punish him your detectives have made it much worse for him than he would be had there not such a close search made for him—he has kept his health wonderful considering his close confinement, we do not see him after or even hear for him—the last time we saw him he had been ailing with pain from stoppage of urine—he would go 24 and 30 hours without making water and then would cry with pain when he would urinate but his custodian got him some medicine which helped him we tell you positively Mr. Ros his hiding place must be a tomb unless you bring him out with the ransom for we have a settled plan and shall never degenerate from it and that is death or ransom—you will find we speak truth in this for ever if you compel us to put him to death you shall receive a letter in 24 hours after where you will find his body. as soon as we catch another kid and it will be a millionaire this time your child must die—we will then see if he will be so heartless as to let the child die—"

To this I replied, "John, your terms are accepted; name time between payment and delivery." The next letter, the 19th, is dated New Brunswick, N. J., Sept. 30. In this they express

their gratification that I have at last agreed to their terms, but I might have had him at first if I had complied then. I will read the rest.

"We think we told you once how we would return him to you—but this is the way we propose to do—we will take him to some minister's house at night put a label on him stating this is Charlie Ros take him immediately to 30s Market st phil or Washington lane Germantown you will find a sufficient sum in his pocket to pay you for your trouble no reward will be paid—we have sent word to his parents stating where he is. You can rely on us, bad as we are and capable of the blackest deeds we have some honor left. Your large rewards prove this. There are 4 of us to divide the \$20,000 and either one could have went and got the reward if he had been without principal. Mr. Ros put your child when you get him on exhibition and you will realize all your money back in 6 months for there is not a mother in Phila. that will not pay a dollar to see him."

I replied: "John, the money is ready—state clearly and fully mode of payment and manner of delivery."

Their answer (letter 20) came Oct. 16, dated at Newburgh, N. Y. It is little else than a repetition of several previous ones. The child is still living but closely confined. He is safe from a violent death so long as there is a prospect of the money. When he is returned it will be in the night. Should one of their party be captured, he will be killed. They charge that I am keeping up the correspondence to get a clue of their whereabouts, and ask if I am ready to take a short journey and have the thing settled. I replied, "John, too sick to take journey. Will relative answer?" On 20th Oct. came their 21st letter, dated Philadelphia. Any one, they say, even the captain of police or the District Attorney may act as my substitute. He must be in New York Nov. 3d

and first state in the *Herald* his full name and his hotel. They will then return the boy if the money is all right as safe and sound as on the day he was taken. And they boastingly call attention that they are in Philadelphia. I replied, "John, change address of personals. Relative will not sign his name in full."

On Nov. 3 the 22nd letter came from New Brunswick, N. J. They say it is strange I quibble about the name. They have spent \$15 a day since Charley was taken and kept him 100 days longer than they expected. If the money is not paid I will never get him alive but will be informed of his death. One of them has been selected by lot to kill him. To this I replied: "John, you must change the name of John for personals. It has become too well known." On 7th November I received this letter, dated from Philadelphia, and will read it as it is the last I ever received from the kidnapers.

"Mr. Ros, "This dozing about puts us to no small amount of trouble we had left phila for New York thinking you were ready to close up business. we told you positively procrastination is dangerous. had we accomplished what we have been fishing for the last three months your child would now have been dead but we have not yet caught the fish we wanted. yours is but a small item compared with something else Walter said you owned the two new houses right opposite you or we should never have troubled you. Mr Ros you have asked to keep this negotiation a secret between ourselves it is a wise policy in your doings not that we fear being trapped in our game. This is positively the last from us. if you are sincere you would be anxious to settle this business if you regard the life of your child. We mean to fulfil every promise we made you in good faith. the result depends entirely with yourself whom you appoint to transact this business for yu we want at least two days notice before you come to New York for we may be 500 miles off and we ask for time to get there you can say Tuesday nov 10. Saul of Tarsus (choose your own name say i will be stopping so and so all day. do not leave the hotel wherever you may be stopping for one minute during the day) this thing must come and shall come to a close in a few days.

My child has never been returned to me nor have I seen him since the morning of July 1st, 1874.

Henry Lewis: Am a merchant here and a brother of Mrs. Ross. In November just before the receipt of the last letter Mr. Ross broke down physically, had to take to his bed and then be removed to a country place. I then took charge of the case and conducted the correspondence in his name. I made up my mind that nothing would save him nor his wife either, who was in a state of nervous collapse, but the recovery of Charley or the solving of the mystery. So I determined, as did my brother and nephew and the rest of the family, that it would be better to pay the money on the terms fixed by the robbers and take the risk of the boy being returned. Accordingly on Nov. 15 I published in the *N. Y. Herald*: "Saul of Tarsus. Fifth Avenue Hotel, Wednesday the 18th inst. All day. F. W. Lincoln." On Nov. 17 my brother, nephew and myself arrived in New York, registered at the hotel in the name of Lincoln and I remained in my room all the next day with a satchel containing \$20,000 in U. S. notes of small denominations. But no one appeared to claim it. So the following day I published in the same paper this personal:

"Saul of Tarsus. We have performed our part to the letter, you have broken faith. We will have no more trifling. Action must now be simultaneous."

No answer was ever received to either of the last two personals.

Walter L. Ross: I am the son of Mr. Ross who just talked to you and the brother of Charley.

Am over seven years old. On the first day of July I went out into the lane with Charley. While we were playing two men came along and spoke to us; they were riding. They said they heard us shooting fire-crackers in the yard and asked us if we did not want to go and buy some. Charley said he wanted to; they lifted Charley in and then I got in. I was put between the two men, while he sat on one of the men's lap. They stopped at a hotel and got Charley and me a drink of water; they stopped next in a street and turned at a corner, told me to go in and buy fire-crackers. The wagon did not stop at a store but around the corner. I went in and bought firecrackers, the men gave me money to buy them with; Charley was in the carriage. I got the firecrackers and then I came out of the store and found the buggy was gone. I screamed and some ladies came up and asked me what was the matter and I told them my brother was gone. A man came along and asked me where I lived and I said on Washington Lane; he said, "in Washington"? "No", I said, "in Germantown". Then the man asked me whether I did not want to go to the station-house and I said "No, I wanted to go home." He took me home. I first saw my father on the lane coming up. While we were riding in the buggy Charley cried; the men said we were going to buy fire crackers now. Charley said before we got in he wanted to buy torpedoes, but the men said they were going to buy candy and fire-crackers at Julia Ann's. There was a cover in this buggy; it had a red stripe; they had this

cover spread over Charley and all of us. Charley rode all the time on the man's lap. I had seen these two men before and had talked with them. They gave us candy twice before they came and took us away. This was Sunday before they took us away. They then said when they saw us, "Halloa". Did not see the buggy on that day; this was in the afternoon when we were going to Sunday School. Saw the men on another day. We took the candy to papa and told him that a man gave us some candy. One of the men had his nose up this way and the other one down. There was a cut on the man's nose whose nose was up that way; the one that had his nose turned down had a moustache; it was red; his hair was red; one had on a pair of

black pants and a light jacket that reached to his knees; the other had on black pants, black vest and black jacket. The one that was driving showed the other his hat and said it was worn out and he would have to get another one. The other said slower, slower, faster, faster as we were going along. They gave us candy several times in the wagon. When I next saw them it was in Brooklyn, when they were dead. I recognized them as the men who had taken Charley.

James Lewis, a newspaper reporter, and *E. A. Scott* of the *Ledger* who had interviewed the prisoner at the Central Police station after his arrest, read from their note books the statements he made to them. They are repeated by him in his testimony.

Mr. Hagert: My next witness is Captain Walling, Superintendent of Police of New York City, by whom I propose to show that Westervelt agreed to keep him informed of the movements of Mosher and Douglass but failed to do so, kept back and deceived him as to the movements of these men which would have led to their arrest and from which the jury will be asked to infer that Westervelt was informing Mosher and Douglass of the movements of the parties who were then seeking to arrest them and recover the child, and so interfering as to prevent their arrest, and that he was acting in bad faith with the authorities.

September 1.

Captain George W. Walling: My attention was first directed about the middle of July to Mosher and Douglass in connection with this abduction. On the 18th August I first saw the prisoner in relation to it. He was brought to my residence by Captain Heddon; suppose he was under arrest. No threats were made to him to say anything. Offered him the whole of the reward if he would assist me in the recovery. Did not ask him to make

any statements. He said in answer to my offer that there were so many policemen in it he would get a small share. He asked how much he could get out of it and I said all there was to be made. There had been no warrant or oath against him at that time. Held numerous interviews with Westervelt. I came to an agreement with him that if he would give me any information it was not to be known to them that he gave them away.

Prior to their being killed he came to me and declined to give information as to Mosher, but said he would give information respecting Douglass; part of the time he was to devote to Mosher, and the remainder of the time to Douglass; the interviews were held, the most of them, at headquarters; a few of them at my private residence; at these interviews I asked him if he could give me any information of their whereabouts or where they could be found; he didn't seem to know where to find them about that time, and said he would have to wait for them to communicate with him; I would ask him if he had seen them since our previous interview, and he would deny having seen them, with one exception, and that was in the first part of November; he at that time first denied having seen them, and I told him I had proof to the contrary; he said that he had met them once in West Washington Market, and once on the street in the evening; that he had attempted to follow them, but they took a stage at Broadway and went down town; he expected they had taken a car to go where the child was, to see it; he thought it was on the line of the railroad somewhere between New York and Philadelphia, not far from the railroad; he didn't know, but thought it was somewhere near Trenton.

September 3.

Cross-examined: Am chief executive of the New York Police Force. My attention was first directed to the abduction by Captain Heddon, who told me that Officer Doyle had found a man who knew Mosher and Douglass

and suspected them. I had them brought before me and at once notified the Philadelphia authorities. Gil Mosher was the man. He agreed to find Mosher but never did. Prisoner told me where they had been living previous to the abduction. He informed me of the names under which Mosher and Douglass went in this city; he agreed at the third or fourth interview to furnish me with information to assist me in arresting Mosher and Douglass; it was no part of that agreement that he should arrest them; I had other parties looking for information; I knew where he lived, I had his house watched and he knew it, and he told me it was no use, they would not come there. Did not at the first interview know what Westervelt was doing; he said something about having nothing to do, no money and but little in the house to eat. I gave him \$5. Don't remember his ever coming to me without being sent for. He told me he was looking for work and would sometimes get a day's work around Washington market. During that time he was engaged as a driver on the Eighth avenue cars. At the last interview I had with him he took out a memorandum book and showed me the name of "Saul of Tarsus." The personal, "Saul of Tarsus" appeared on Monday and I sent the officer to bring him on the following Thursday. It was after the time fixed in the personal for the interview. I never knew of the whereabouts of Mosher and Douglass after the abduction of the child; the first that I learned was that there was a place in New York to which Mosher and Douglass had gone;

made efforts to arrest them there and had the place watched, and Westervelt accused me of having watched him and I withdrew the watch; was satisfied Westervelt and Mosher and Douglass met there; had officers looking for them at that time, and Westervelt was then professing to endeavor to find out the whereabouts of the child instead of the immediate pursuit of the two men; he promised me to do that; he told me he would not give away Mosher, but that he would give me Douglass. Didn't have Mrs. Mosher watched; he was not at this time always under surveillance; sometimes sent parties to see if he was at work on the cars. He told me nothing about their being on the river in a boat, but did tell me where they took their meals in the city. He said if he got back on the police force he could do more than as a private citizen and I told him I would do what I could. But after talking to the Commissioners I found it was impossible to have him reinstated. When he said he would do all to arrest Douglass, but he would rather not as to Mosher because of his sister and children, I told him I did not blame him. I did not ask him to go to Bay Ridge to see the bodies. Afterwards I asked him to go to Philadelphia as the people over there wanted to see him. He said he had no money, so I gave him a ten dollar bill.

Captain Heddon and *Officer King* corroborated statements made by Walling, and related the conversation that they had with Westervelt and the efforts that they had made for the arrest of the suspected parties. The ac-

cused declined to have any connection with Captain Heddon in prosecuting his plans for obtaining information of the whereabouts of Mosher and Douglass, and said that he would only do business with Superintendent Walling. Officer King asked him why he did not tell him where to look for the men, for he would have arrested them. Westervelt replied that there were already too many in it now.

Charles H. Stromberg: Live in New York City; in the summer of 1874 I kept a drinking saloon at Mott street. Have known Westervelt three years. From about the middle of June to October 15 I saw him there almost every day during that time. In the summer of 1874 saw Westervelt in company with Mosher and Douglass at my place some five or six times; first about the latter part of June, 1874; the next in July; next saw them in September twice. In December Westervelt came first in the daytime and Mosher and Douglass came afterward; they took a drink and I did not hear the conversation. Mosher and Douglass went out first and Westervelt would go out a quarter or half hour afterwards. Again in October they came in and took a drink; Westervelt was not there at the time. Westervelt, about August, wrote a letter, left it with me and told me to give it to either Mosher or Douglass if they came in for it; they did not come and I returned it to him; had not seen him there in the meantime. He told me he had been up the river on a clam-bake. Had a conversation with Westervelt the latter part of September, 1874; he said, "I can

tell you confidentially that I can make from ten to fifteen thousand dollars but by doing so I would have to give somebody away which would send them to the State Prison for twenty years or for life".

Cross-examined: Am employed in the State Department, New York. I kept a lager beer saloon at Mott street; was living there all the time from 15th June until October. Mosher and Douglass were twice in my house before I knew who they were. An intimate friend of Westervelt, Mr. Hartman, told me that they were Bill Mosher and John Douglass; that Mosher was a brother-in-law of Westervelt's and had served five years in the State Prison. The first time I saw them in my saloon was about the middle of June; Westervelt was there. The next time was about the middle of July. After the first and second time I took memorandums of their being there. When I heard who they were and what they had done that aroused my suspicions. Had a little difficulty with my brother-in-law; had him arrested for getting drunk and raising a disturbance. Westervelt was examined as a witness; Westervelt wrote the letter in my saloon; I furnished him with the material.

I informed Superintendent Walling of the visit of these men to my place. First heard of the supposed connection of Mosher and Douglass with the abduction after the second time they visited Mott street.

It was the next day after the second visit of Mosher and Douglass to my place that Mr. Hartman told me that they were suspected of it; informed Mr.

Walling the latter part of September; necessity compelled me to keep quiet from the middle of July to the 1st of October; I knew the dangerous character of the men.

September 6.

William Q. Titus: Am on the New York detective force. I went with prisoner to Rondout to ascertain the whereabouts of a boat and a letter that Mosher had written in Philadelphia and that prisoner had mailed in New York. It was to a Mrs. Murdock asking her to send him what he owed her for a boat he had sold her (the letter was produced and read; it was signed Wm. Hendricks). Prisoner told me on the way that if he had been put back on the force, he could have got the two abductors Mosher and Douglass and the child.

Clinton G. Mosher: Am a brother of William Mosher; am often called Old Gil Mosher. This letter signed Wm. Hendricks is in the handwriting of my brother. So are all these letters addressed to "Mr. Ros."

William V. McKean: Am manager and editor of the *Public Ledger*. Through Captain Walling I had an interview with prisoner in New York. Thought he was not telling the truth, that he was evading questions and not giving information which he professed willing to furnish. He admitted that Ike Morris had brought to his house a message to his sister from her husband with \$50 and that he had seen the two men three times. He also informed me that he had made several visits to Philadelphia and that he came on in August, 1874, at the suggestion of

Mosher to ascertain whether any inquiries had been made for him in Monroe street, where they had formerly resided, and if things were right a personal was to be inserted in the New York *Herold* in these words: "Napoleon—I have seen them and they are well". If things were not right the personal was to be the reverse: "They are not well".

One of the interviews lasted over five hours, when I told Westervelt that he was not telling all that he could and said to him that if the child was killed the blood of Charley Ross would be upon his hands. He rose up in his chair and said, "God forbid".

Mrs. A. S. Spear: Reside in Brooklyn. Saw Westervelt on 6th July, 1874, in Brooklyn. Took a horse-car at the City Hall, Brooklyn; there was seated opposite to me a man and child; recognized William Westervelt. The child was very fair and had dark eyes—light, soft, curly hair; it was about four years of age; had a brown linen suit on. Over the linen suit was drawn a blue linen sack; it had no hat on. The man spoke to the child but once; the child cried; he said, "hush, hush." The child seemed frightened at him and screamed. The man said, "Go see mama, go see mama." The child stopped screaming then. Westervelt took crackers out of his pocket; the child took them and became quiet. When the car got to Fourth street he got out and took the child on his arm; he went as though he was going to Williamsburg. Think I had read of the abduction of Charley Ross before I saw the man, but did not remember it at the

time. Am positive that Westervelt is the man who had the child and to make certain went to the county prison last June and saw him. I communicated the information to Superintendent Walling.

Mr. Hagert handed witness photographs of Charley Ross and asked her whether it resembled the child she had seen.

Mrs. Spear: I consider them good likenesses; they bear a very strong resemblance to him.

Mrs. Catherine Lyons: I formerly lived at 237 Monroe street. Saw Westervelt next door, where he resided in July, 1874, and also Joseph Clarke there, otherwise Douglass. Westervelt's sister's husband went by the name of Henderson.

William Gilbert: Keep a saloon on Girard avenue here. In June last year prisoner, Mosher and Douglass were at my place. He was introduced to me by Mosher. The two men had a horse and buggy with them.

September 9.

Henry Hartman: Was employed at Stromberg's saloon where I saw Mosher, Douglass and the prisoner together several times. They were there in the early part of July a year ago. He introduced the two to me as Henderson and Smith. On the first visit he told me they came from Philadelphia. Once prisoner told me that he would bet two shillings who were in the abduction. Another time he said that if I saw a chalk mark on the cellar door I was to let him know as it was a signal where to meet them. He also said that if they were arrested the child would not live three days, that

Mosher knew where the boy was but that he did not. After the killing at Bay Ridge he told me that Mosher and Douglass were the abductors.

Henry McDowell: I reside here. Saw Westervelt in Germantown in the latter part of July or the beginning of August, 1874, in my store. He came in and asked for a drink of water and talked about the day being very warm. He spoke of this being the place where Charley Ross had been taken from. He had a great deal of sympathy for Mr. Ross and was very sorry for him. He asked me if I knew Mr. Ross; I said I did, that he belonged to the same church with me. He talked about Charley; asked whether I knew anything about Mr. Ross failing in business. He asked whether his brother-in-law was a rich man; I said I believed he was. He was in the store about half an hour. He made no purchase. He had no beard but a moustache and light whiskers.

Cross-examined: Had no idea of the man until I saw him in the Court-room.

September 7, 1875, Officer James Moran was recalled in obedience to instructions received from Superintendent Walling. I watched the Astoria ferry on two occasions for the men but without success; also watched a place kept by Smith & McNeil, opposite the Washington market which Mosher and Douglass had been in the habit of frequenting, but did not succeed any better. Saw Westervelt on the 18th July, 1874. The prisoner at that time had no beard under his chin; he had a moustache and light whiskers. He

now has hair and a very full crop around his face.

Captain Heins: Am of the Police Department of this city. Became connected with the case on the 2d July, 1874, and from that time up to the present, have made every effort to recover the child. (He detailed what had been done by him and his brother officers to secure the arrest of the abductors, and said that every stable had been searched for the purpose of obtaining some clue to the horse and buggy used by the men in perpetrating their crime.) All the houses of prostitution were visited, in the hope of finding the child, and the ferries and all the vessels from this port to Delaware City were searched. Did not know either Mosher or Douglass, and did not know that they were the abductors until Superintendent Walling on August 2, 1874, sent a telegram to the Chief of Police here asking him to send a detective to him at once, with the abductors' letters to Mr. Ross. I was ordered to go with the letters and Mr. Joseph Lewis accompanied me. On arriving the Superintendent told me that through Captain Heddon he had got hold of a man who professed to know the men who had stolen the boy. He sent for the officer and the man. The man was Old Gil Mosher and he repeated his story to us. He said that a few months before Charley Ross was taken away a plan had been arranged to abduct a child belonging to a member of the Vanderbilt family at Long Island; he was informed of the plot and asked to join it. The child was to be taken while playing on his father's lawn and secreted. Fifty

thousand dollars was to be fixed as the ransom. He was asked to receive the child on a small vessel stolen on Long Island Sound and keep it until the money was obtained when he would be notified to come back with it and the child would then be returned to its parents. For this service he was to get a certain portion of the money. He declined to join in this conspiracy. The circumstances connected with the stealing of Charley Ross being similar he believed that the same persons who had arranged the plot to take the Vanderbilt child had stolen Charley. He gave the names by which the persons had been known who proposed to him to engage in the Vanderbilt abduction as Johnson and Clark and also their true names, William Mosher and Joseph Douglass and said that he believed they were in Baltimore, Md. He also said that if his suspicions were correct Mosher was the leader of the party; that he had arranged the plan and was the writer of the letters he had received. He said he was familiar with Mosher's writing and could tell if he saw the letters whether he had written them or not. When the letters were shown to him he affirmed without any hesitation that they were written by Mosher.

Albert Van Brunt: I live at Bay Ridge, Long Island, with my father. It is a summer residence place for New Yorkers but we live there the year round. Separated from our house by a lawn only is the summer home of my uncle, Judge Van Brunt of the Supreme court. He closes it in the winter leaving it in charge of William Scott, his gardener,

who lives in a small cottage close by. Last fall the judge had a burglar alarm put in his house. About 2 on the morning of December 14 last my father and I were awakened by the alarm in the Judge's house. I dressed hurriedly and getting outside saw lights flickering in the house of my uncle. I at once aroused Scott and our man Frank and coming back told father that there were burglars there. He had dressed and had collected our shot guns and pistols which he distributed to us saying: "Now, boys, we have work to do and must understand each other; we must capture those fellows if we can without killing them, but if they resist we will have to defend ourselves. Albert, you and Scott stand before the front door, Frank and I will take the rear and whatever happens afterward, let us remain in the positions we first take up; because if we move around we will be certain in the dark to shoot one another instead of the thieves. Whichever way they come, let the two who meet them take care of them as best they can; if they come out and scatter both ways, then we will all have a chance to work." We took our places; the night was pitch dark, cold and wet. We waited for nearly an hour, while the burglars went through every room in the house, with the rays from their dark lanterns flashing now and then through the chinks in the shutters. Finally we saw the light go into the basement and presently the trapdoor of the cellar opened and the body of a man, followed by the head of another appeared. My father cried "halt". The response was two pistol

shots which missed us. Father then fired at the first man, who fell with a loud cry; the other dashed to the front and almost into my arms; he fired and missed me and as he raised to fire a second time I struck his arm with my shot gun. As he turned to run I fired into his back, he staggered as he ran but then fell and we found him stone dead with his empty revolver beside him. The other one we found mortally wounded. He cried for whiskey, then for water which one of our neighbors, Mr. Burgin, gave him. By this time a number of people aroused by the firing were on the scene so I went to look after father, and to get him back to bed as he was in poor health at the time. When I returned, the second burglar was also dead.

Theodore V. Burgin: I got to the Judge's lawn just as a man on the ground was calling for a drink which I gave him. I said "Who are you and where do you come from?" He replied: "Men I won't lie to you; my name is Joseph Douglass and that man over there is William Mosher. He lives in the city and I have no home. I am a single man and have no relatives except a brother and sister who I have not seen for twelve or fifteen years. Mosher is a married man and has five children. I have \$40 in my pocket; I wish to be buried with it; I made it honestly. It's no use lying now, Mosher and I stole Charley Ross from Germantown." When asked why they stole him he replied, "To make money". He was then asked who had charge of the child to which he replied: "Mosher knows all about the child, ask

him". He was then told that Mosher was dead and was raised up so that he could see the dead partner of his guilt. He exclaimed, "God help his poor wife and family". To the question, "could he tell where the child was," he answered, "God knows I tell you the truth; I don't know where he is; Mosher knew." The same question was repeated a number of times to him; but he gave no further information but said: "Superintendent Walling knows all about us and was after us and now he shall have us. Send him word. The child will be returned home safe and sound in a few days". He told his inquirers that they had come over in a sloop which was lying in a cove and begged them not to question him any more and not to move him as it hurt him to talk or move. He remained conscious until about fifteen minutes before his death.

James Sellick: Am a detective on the New York police force. On the morning of the killing of these two burglars, Captain Walling sent me over to Bay Ridge to identify them. As soon as I saw the dead bodies I said, pointing to one and then to the other, "That is Joe Douglass and that is Bill Mosher. Take the glove off his left hand and you'll find a withered finger." I knew that in his early life Mosher had lost the dividing cartilage of the nose from disease and his appearance and speech from that cause was peculiar. I also knew that from a felon on the first finger Mosher's left hand had withered away to a point and the nail on the finger had grown to the shape of a parrot's beak.

To conceal this defect he usually wore gloves.

Later Walter Ross was brought in the room where the bodies were by his father. The prisoner was there at the time and had stated to us that the dead men were Mosher and Douglass. When the bodies were shown to little Walter he was left to himself, no one asking any questions. His recognition of Mosher was slow and gradual, his memory reviving by degrees; but the instant he saw the body of the other man he said: "Oh, that's awful like him; he's the driver of the buggy." These exclamations came quick, spontaneous and with an earnestness that was as convincing as they were impressive. Subsequently he said: "He," pointing to Douglass, "was the one that gave me the money to buy the firecrackers." Again he said: "He was the one that gave me the candy, and the other one," pointing to Mosher, "he some times had candy too".

We found nothing on the bodies to connect them with the abduction. They had with them a complete set of burglars' tools and each one had a revolving pistol and a large knife. The boat on which they came to Bay Ridge was thoroughly searched; there were found on it a few copies of the *New York Evening Telegram* in which was a burlesque account of the finding of Charlie Ross; nothing however was discovered to give the least clue upon which to work. The boat we ascertained had been stolen at Bridgeport, Conn. When

taken it was a cat-rigged sail boat but had been altered by Mosher into a sloop.

We afterwards, in the Police office, questioned both the prisoner and Mrs. Mosher but they were unwilling witnesses. Mrs. Mosher said that her husband had told her that the child had been placed with an old woman and was well cared for but she did not know who his keepers were or where they lived.

Peter Callahan: I was Mr. Ross' gardener on July 1, 1874. On that day before six as I was going out of the gate on my way home I saw Walter and Charley playing outside. Before I got to the corner I met a buggy with two men in. I looked at them and remember their faces because as I turned I saw that they had stopped and were talking to the boys. Thinking that they were people that knew them I went on home. At Bay Ridge I saw the bodies of the two burglars. I identified the one they said was named Clark or Douglass at once. He was the one that was driving the wagon when I saw him last. And I am pretty sure as to the other; indeed I am certain from his general appearance that he was one of the men, but when I looked at him he put up to his face a handkerchief which partly hid it. I suppose he did so to hide the deformity of his nose. I recognize the body, now, fully.

Mr. Hagert read the 23 letters received by Mr. Ross from the kidnapers.⁷

⁷ The first two are given in full, the others being sufficiently described in the testimony of Mr. Moss. (ante p. 186.)

July 3. MR. ROS—be not uneasy your son Charley brewster be all right me is got him and no powers can deliver out of our hand—you will hav to pay us befor you git him from us—and pay us a big cent to—if you put the cops hunging for him is only defeeting yu own end—we is got him fitt so no living power can get him from us a live—if any aproach is made to his hidin place that is the signal for his instant anihilation—if you regard his lif puts no one to search for him your money can fetch him out alive and no other existin powers—dont deceive yourself and think the detectives can get him from us for that is impossible. You here from us in a few day.

PHILA., July 6th.

MR. ROS—we supos you got the other leter that tells you we had you child all saf and sound. You mite ofer one \$100,000 it would avale you nothing—to be plaen with you you mite invok al the powers of the universe and that could not yu child from us—we set God man and devil at defiance to rest him out of our hands. This is the lever that moved the rock that hides him from you \$20,000—not one dollar les—impossible—impossible—you cannot get him without it—if you love money more than child you be its murderer no us for the money we will have if we don't get from you we be sure to get it from some one else for we wil make examples of yure child that others may be viser.

We give you al the tim you want to consider wel wat you be doing. you money or his lif we wil hav—don't flater you self you wil trap us under pretens of paying the ransom that be impossible—dont let the detectives mislede you they tel yu they can get him and arrest us to—if yu get the detectives in serch for him as we tel yu before thay only serch for his lif—for if any aproach be made to his hidden place by detectine his life wil be instant sacrificed. You will see yu child dead or alive if we get you money yu get him alive if no money you get him ded—wen you get ready to business with us advertise the follering in *Ledger* personals (Ros. we are ready to negotiate). We look for you answer in *Ledger*.

September 10.

Mr. Hagert: The case of the Commonwealth is closed.

Mr. Ford: I ask the court to direct the District Attorney to elect on which count of the indictment he will go to the jury upon. Also that you will pass upon the question whether there has been adduced sufficient evidence to require the defendant to answer upon the first and second counts, charging abduction and concealment of the child within this jurisdiction.

Mr. Hagert: The latter portion of Mr. Ford's request would involve a discussion of all the evidence offered in the case, which at this time would be unfair to the prisoner. As to the first, Wharton's Criminal Law says that when an indictment contains several counts in different forms an offense arising from one and the same transaction, the rule was not to force the prosecutor to elect upon the counts.

Mr. Ford: The counts contain charges of distinct crimes and therefore under Mr. Hagert's citation my application should be granted.

JUDGE ELCOCK: The motion is denied.

MR. FORD addressed the jury referring first to the months that the prisoner had lain in jail, awaiting an opportunity which he now enjoyed of proving his innocence. His counsel had determined to offer no evidence but it was the prisoner's desire to take the witness stand and with the Holy Book in his hand prove that he was not guilty of the terrible crime with which he was charged. He had no money to procure witnesses; he was in a strange city; his friends were far away and hence their witnesses would be few. Entreating the jury to free their minds from the prejudice which the peculiar nature of the crime and its long discussion by an outraged public had aroused, he proceeded to offer his testimony.

Mrs. Mary O'Leary: I lived at 233 Monroe street, here, in July, 1874. Know the prisoner. Saw him about the middle of August but never in July.

Kate Morgan: In July, 1874, I lived with Mrs. Henderson at Monroe street. Mrs. O'Leary lived next door. Saw prisoner there on a Saturday morning in August, never saw him there in July; saw Henderson and Clarke

there in July.

Mrs. Annie McElroy: In July, 1874, I lived in the rear of No. 235 Monroe street; saw Mrs. Henderson there; she was confined there in July; saw Westervelt there the Saturday before she left in August; he was washing himself at the hydrant; saw him before that in the winter time; did not see him there any time in July.

Mr. Ford: I shall now call Mrs. Westervelt.

MR. HAGERT objected. The act of Assembly permitting a person indicted for misdemeanor to be examined upon his own request does not remove or affect the policy of the law disqualifying the wife of the defendant from testifying for or against him, and this has been decided in New York and Ohio. I would ask Mr. Ford whether he intended to examine the prisoner, for if he did, the Commonwealth would not object to the examination of the wife.

JUDGE ELCOCK thought Mr. Ford should first state whether he intended to examine the defendant, because otherwise the Court could not know whether even he was a competent witness, and if it should result that he was disqualified, certainly the wife would be in no better condition.

MR. FORD demurred to being required to state first the order of his testimony, for if the law removed the disability of a defendant upon his simple request, it would also remove that of the wife upon his request, for they are both one.

MR. HAGERT: The Commonwealth objected to the examination of Mary Westervelt, because she was disqualified as a witness by being the wife of the defendant on trial, and was a co-defendant with him in the indictment; but the Commonwealth proposed to withdraw the objection if Westervelt was first called and examined.

JUDGE ELCOCK: She is not a competent witness until he makes his election. Indeed, she is not then, but the Commonwealth waives that objection.

Mr. Ford: Mr. Westervelt, do you desire to be examined?

Westervelt: I do sir.

Mr. Ford: That removes the objection.

Mary Westervelt: The prisoner is my husband. The latter part of January, 1874, we moved from New York to Philadelphia. Mrs. Mosher's husband was making a preparation to kill moths and as my husband could not get any paying employment in New York, I was to put it up. I went to her house, 235 Monroe street. We occupied one room in the second story. My husband got some gas burners in New York to sell here, then he sold stove blacking. I used to sew on the machine; make garments, that were sold at auction. April the second year we went back to New York as he could find nothing to do here. At Monroe street my husband and Mosher were not companions, they seldom went out together. He wore a heavy black moustache while we were here; at one time he wore side whiskers, a long time ago. In New York we went to live in a tenement house on the top floor, back. My husband was not successful in getting anything to do; did all my cooking and other work. My husband came back to Philadelphia some time in June. He had two hundred packages of this "mothine"; he thought he might be able to dispose of it here. He sold some in New York, some in New Jersey, Williamsburg and Brooklyn. Some days he would do very well; made as high as six dollars. The first July, 1874, my husband was home in New York. The 2nd July he was in and out

of the house as usual; the third he was at home; he was suing the Commissioners for discharging him; Col. Fellows was his counsel; he was in and out of the house as usual, at breakfast, dinner and supper. In the evening he was home. On 4th July he was tending bar at a picnic—he returned between ten and eleven o'clock. On the fifth July he attended another picnic; brought five dollars back that day. The sixth July was my birthday; he was in the house nearly the whole day. He was very tired after attending the two picnics, one after another. Don't know of him going out that morning at all; after breakfast he took a pillow and an ironing blanket and laid down and slept most of all day. Seventh July he was in and out of the house; was not away from home any night in July. I saw Mrs. Spears some time in June or July this year; she asked me did he look pale and have a full beard when he went away. I told her he had a moustache and side whiskers; she said she would like to help me.

September 11.

After his return from Philadelphia he was in the habit of being about the house, or in and out, except when he was selling the moth powder, and when if he went out of the city he would be gone all day; he was away all night, only when he came to Philadelphia in June. On June 29 he asked me what I was go-

ing to do for the rent on July 1st; I said I didn't know unless I took his breastpin and pawned it; I took the pin and a little watch and raised \$7. The ticket was on the 29th June; he may have it. Couldn't say where he was on the day before the 29th June. The day after he was home part of the day. He had had no regular employment since he left the police force. Remember he was at home on the 30th, from what happened on the 29th. We had a conversation that day about an occurrence on the 29th. Remember that day because it was rent day and he told me to give the landlord only \$4 that day, that he was going on a picnic on Saturday and I could give him the rest when he came back. Can't remember the 8th, 9th or 10th; remember the 11th because I had to pawn some things that day; know he was at home all day.

Saw Mosher and Douglass the night before they were killed at 184 Houston street. My husband was there but did not come home with me, he put me and the children on a street car and did not come home till morning, but he brought home a fish. Didn't ask him why he hadn't come home all night; it was unusual for him to stay out all night. Was mad

because I had to bring the children back, that was the reason I didn't ask him. On the Sunday before the shooting my husband was home all day until afternoon, and then he and I and the children went to my mother's and stayed until 9; never heard until he came here that my husband was suspected by the police with this transaction; I didn't know then until Superintendent Walling told me; didn't know he was assisting Walling at all until Walling told me.

Mr. Hagert: Did you say to Mrs. Manning that Mosher had stolen the child to get money to build a floating palace, and if Mosher had lived until Wednesday after 14th of December, 1874, Charley Ross would have been given up; that a paper had been drawn up for his delivery in a hotel in New York? No, sir; I never said anything of the kind; I never heard it to say it. Did you tell her that Mosher breakfasted with you and your husband the first Sunday morning after you moved into Henry street house? I told her something about that. Do you say that nothing was said in that conversation about the stealing of the child? No.

THE PRISONER'S STORY.

William Westervelt: Was thirty-three last October; was born at Paterson, N. J.; lived there until about eight years of age, then moved to New York with my parents. Have had twelve brothers and sisters. One sister's name is Martha; she married William Mosher. Was a boiler maker; had been in San Francisco, also in New Orleans. Was in the army in the 15th New Jersey Volunteer regiment. Came back to New Jersey in 1866 and have always counted that my home since. Prior to January, 1874, was a member of the New York police force. In January, 1874, I was dismissed,

they said because I did not report a lottery office, but the real reason was that I would not subscribe \$10 to a political club. We then removed to Philadelphia and lived with my sister, Mrs. Mosher, at 253 Monroe street. Tried everywhere for work; sold gas burners, answered advertisements, but got nothing, so went back to New York in April. Came back here in June to sell moth powder; stayed with my sister. I didn't like peddling in New York and thought by coming on here where no one knew me I would do better. Had told Douglass and Mosher that I was going back to New York. The day I had done poor and got discouraged Mosher said to me, "Come and take a walk." He showed me that horse and wagon; remained there long enough for him to feed and water the horses. The last night before I went back, I spent the evening at Gilbert's on Girard avenue.

I was not in Brooklyn on July 6, 1874; did not take a horse car that day or any other day at the City Hall there. First saw Mrs. Spear this June; she came to my cell door. Said she was visiting different institutions and would call and see my wife when she went to New York. I learn she did; she gave me three tracts. I was not in Germantown at any time nor in Philadelphia in July, 1874. The testimony of Mr. McDowell is as false as false can be. I never saw the man until he came on the witness stand. I wore nothing but a moustache in 1874; in 1870 I wore side whiskers. After my return to Philadelphia in June, 1874, the first time I saw Mosher and Douglass was on August 14; saw him afterwards several times. I took a letter from him, Mosher, to mail in New York. After that I saw Gil again; he gave me a letter to send to Bill, stating that he would like to see him at the request of an old friend; there was something else in it that I don't remember; it was open when handed to me; I read it and directed it; think it was signed Gil; I mailed it to No. 235 Monroe street. When Mosher came to my house, August 14, Douglass was with him; left them there and went down town to see my counsel, Colonel Fellows. Had told them about his brother Gil coming to my house several times inquiring for them, and think he said there had been more men at his house several times inquiring for him. Bill asked what could Gil want of him and asked me if I knew where he worked. Bill said something about his having him arrested on the Red Bank affair, that he done it once and was trying to do it again. We went into a saloon and Douglass went over into Madame Morrow's and came back and told Bill that Gil had been there looking for him and inquired if she knew where he lived. Then Bill went over himself; when he came back the tears were running down his face and he was making threats of what he would do to Gil. Bill got some paper to write the letter but said he was so nervous he could not write and asked me to write. I wrote it, he dictated it. It was wrote as if to me; it said: "Tell Gil that I can't see what he wants with me; that I have no money or time to spare to come there; for him (Gil) to explain more fully". Went down to Gil's house; Gil was not there; saw his wife, Liz; she told me she was greatly worried about Gil's being away; that Bill and Gil had been getting

away with some silks and she was afraid they were arrested and asked me to make some inquiries to see if I could hear anything about them. I told her they were not together, that Gil had been to my house and had written a letter to Bill and I had an answer to it, which I read to her. Then she called me into the back room and asked me if she could trust me, and if I wanted to make a stake. Told me Bill was suspected of taking the child. She said she had seen the parents of the child and Walling. Went to Stromberg's, there I found them. Mosher asked me to come on here to Philadelphia and help my sister to move on to New York. I came on the latter part of the week. He told me to ask my sister if there had been any one there looking for them, or may be he said Gil or Doyle; he knew that Gil was looking for him and was in Doyle's company and that Doyle had arrested him once before for this Red Bank robbery. He told me that if they had been here to put a personal in the *Herald* when I came back: "Napoleon—I have seen them and they are well"; if any one had been looking for them it was to be: "Napoleon—I have seen them and they are not well". I inserted neither advertisement in any newspaper. Left Philadelphia that next afternoon. My sister told me she couldn't get ready to move until the following week and that was the reason I went back right away. Two or three days after returning I met an officer and in consequence of what he said he and I went to the station house. Saw Captain Hedding there; he asked me if I had any pawn tickets about me, that there had been some silks lost and he didn't know but what I might know something about them. I asked him whether he took me for a thief or what would lead him to think I would know anything about them. He searched me and took what things I had in my pocket; they were a knife, pocket-book, key, two pawn tickets, one for a ring and one for a pistol. From there I went with Captain Hedding and Moran to Superintendent Walling's house. Couldn't state one-tenth of the conversation between me and Walling. He asked me when I had seen Bill; said he was suspected of stealing this child, Charley Ross. I don't know what I replied; told him I didn't believe it, that it was a job of Gill and Liz to have them arrested again on the Red Bank affair. Told him Bill was bad enough but I did not think he would do anything like that. He told me that Gil and Bill had been talking of the same kind of a job some time before and he thought that if I would assist him he might be able to restore the child. Told him that if I thought he was the one I would not hesitate a moment to assist him, but I didn't want to be the means of having Bill arrested and taken to Red Bank to satisfy Gil. After a long conversation about the suffering of the parents of the child and what I would do if I lost one of mine, he worked on my mind that way, and I told him about Bill and Douglass coming to my house, going to Gil's shop and to Madame Morrow's. Told him I wouldn't want to give him any information that they would find out came from me. He handed me \$5.

My sister came to my house from Philadelphia on the 20th with her children. The day she came I attended a picnic; I tended bar.

Next saw Mosher and Douglass about four days after at my house; did not know they were coming. After the second interview with Walling, the day after my sister arrived, I saw Walling and told him she and her children were stopping at my house. Know I told him my sister was stopping at my house; when Mosher and Douglass came to my house after this interview they stopped upwards of an hour or two hours, maybe; had no conversation then with them on the subject of the abduction; did not tell them I had been to see Walling; made no appointment with them to meet them. I went over to Stromberg's saloon; I promised Stromberg the night before that I would come over and help him to raise a counter; saw Mosher and Douglass again before I next saw Walling. They came to Stromberg's saloon, not by appointment. The next time I met them there was the time I went to Rondout; about the 20th September; next time was some time in the fore part of October; I called Walling's attention to the Astoria ferry because they spoke of going to Astoria, and asked me how late the boat run. Told Walling that if he would send there most likely he would get them in the neighborhood; then described them to him, how they were dressed and that they had a fishing pole and slate-colored bag; Walling was always talking about having me appointed on the police force. The time we went to Rondout I met them at Stromberg's saloon. I had no signal with them to go there, had no chalk marks on the cellar door. The first I heard of that I heard here. Mosher asked me to take a trip or a sail up the river with them and Douglass said it would be a good picnic; finally agreed to go; did not know before that day that they had a boat. We crossed over to Rondout in a ferry-boat; we then walked up the creek. Mosher proposed to me to commit a burglary; it was not done; had no knowledge that that was their intention when I left New York with them. Never went to Rondout with Mosher and Douglass before or since; never went there alone; saw no letter in the possession of Mosher or Douglass on the trip to Rondout; saw Walling that day; I told him that they were up the river in a boat, that I had seen them; described the boat to him; also told him that when they were in the city they ate at Smith & McNeill's. I never saw Charley Ross or have I any knowledge of his whereabouts; I wish to God I had.

September 14.

First told Walling early in September where the two men lived, also of the horse and wagon I had seen and of the parties I knew them to be acquainted with here. Told him Gilbert had a nice saloon here but had sold out, my sister told me. Up to the killing I should judge I had as many as fifty interviews with the Superintendent. Was working on the Eighth avenue cars in November when I picked up the *Herald* and read the personal "Saul of Tarsus: You have broken faith; we will have no more trifling; action must be simultaneous;" this was after Walling had told me anonymous letters were being sent and answered in the "personals;" had never seen that "personal" before nor had I any knowledge whom

it was intended for; I thought at the time it had something to do with this case; on my way down town with my car, for fear I should forget the words, I marked them down in my memorandum book; saw Walling that afternoon; he asked me if I had seen them or had any news of them; that he believed they were in the city; he then took the file of papers and showed me this same personal "Saul of Tarsus;" I took my book and saw "Saul of Tarsus," and said I thought so, and told him I had seen it. He took my book and looked it over. Believe I saw Mosher and Douglass in Stromberg's saloon five times. Never wrote a letter in Stromberg's saloon requesting him to give it to them or either of them if they came; no such letter was at any time returned to me. Had no conversation with Stromberg in which I said I could make \$10,000 or \$15,000, but by so doing would have to give away a party and send him to the penitentiary; the only conversation I ever had with him in relation to Mosher and Douglass was, I told him they were two hard cases and had both been up the river, meaning prison. Hartman was there at the time. Stromberg had a difficulty with his step-brother; I had been a witness against him. In the second week in October, coming out of the Court-room in New York, he said he would be even with me and remember it all the days of his life. About that time I told Walling I didn't think I was doing right towards my sister and her children in being the means of Mosher's arrest, not through sympathy for him, but my sister and her children would throw it up to me as long as I lived; he said, "I don't know but what you are right; in fact, Bill, I think more of you for it;" I told him as for Douglass, I would use my utmost endeavors to have him taken, and that it might lead to the recovery of the child; he appeared satisfied, and told me to do what I could; nothing was then said about arresting Douglass. Once he said to me "well, Bill, I don't know as I want Douglass just now, I might some other time". Met the two at Madame Morrow's where my sister was stopping early in November; did not see them again until the Saturday night before the killing. That afternoon I was in Madame Morrow's again. My sister, who was living with her, asked me to tell my wife to bring up her children who were at our house that night. We brought them, Madame Morrow is called that; her real name is Mrs. Morris, because she is in the fortune telling business. After we had been there awhile Mosher and Douglass came in. I did not expect them. My wife went home with the children and I went to meet Douglass at a saloon, and stopped at Vandyke's with him; he registered his name as Day; I registered some other name; think it was Wright; occupied the same room, but different beds; when we got to bed he was talking about Gil having Bill arrested on the Red Bank affair; I said, "Yes, and he'll have you taken on the Ross affair;" in a laughing way he said, "What could they do with us if they did get us? They would have to prove it on us; they would have to get some one that seen us take it; or somebody that seen them with it, or it with them;" he said, "You needn't say anything to Bill that I spoke to you about it;" assured him that I wouldn't; he said, "There was a terrible letter sent

on there; it would make your hair stand to read it. I asked him, "Provided the parties were willing, how would he get the money?" He said that was easy enough; they could take a train from one certain place to another and when they would see a signal to throw the money off. They would not get the child until some time afterwards. I asked him who he thought would be foolish enough to do anything like that. He then told me he thought of going to London or Liverpool soon; I asked him what for; he said, "oh, a change of plan." He said he was going to write from there as if he split off. He made arrangements to meet me at Gleason's billiard saloon in the Bowery on Monday, Wednesday or Thursday night of the following week, between eight and nine.

While I was at Rondout, Mosher and Douglass were talking about Liz putting up this job on them about Red Bank, and her saying they were the ones that stole the Ross child; I told them I thought they were the ones that had the child; Mosher said, "You ought to know better; your own common sense ought to tell you it was a job of Liz and Gil." At either of these conversations they did not inform me where the child was; I wish to God they had. On the day of the shooting I left my house in the morning to go to Walling. Met Detective McLaughlin just before I got to the Police station; he told me he was going for me but I had saved him the trouble. The Superintendent put his hand on my back and said: "It's all up, Bill;" that Bill and Douglass were both dead; I said, "No; it's not so; I seen the two of them on Saturday night, and I am to meet Douglass Tuesday, Wednesday, or Thursday. He showed me the dispatch he had just received. I went and saw the bodies and came back and said it was them. I did not tell Hartman that if these two men were arrested the child would not live three days. I did not, on the trip to Rondout, tell Detective Titus that if I had been put back on the force I would have got the kidnapers. I had two interviews with Mr. McKean at Walling's office. I was called all sorts of names by Mr. McKean and Superintendent Walling; Mr. McKean said I was no better than a thief, and no better than Mosher and Douglass; that I wore stolen goods; told them I never wore anything belonging to them, except a pair of studs, which I had on then, worth about twenty-five cents. I deny what he says I told him.

September 15.

I had several talks with Officer King. At the first he asked me why I never spoke to him about the case before; told him that I never spoke to any officers about the matter except Superintendent Walling; he said if he had had the case he would have got the men. He said, "Do you know what I'd done? I would have hired a room opposite your house and I'd a took my mate with me and wait for them;" I told him if that had been done in the first place they would have got them; he didn't say that he would have watched me to get them.

After 26th June saw Mosher and Douglass in New York nine times; can't mention them in their order; saw them twice in my

house, five times in Stromberg's saloon, and twice at Mrs. Morris's; at the latter place the Saturday preceding their death.

Between January 1, 1874, and my removal back in April I was in New York twice; the first visit was about first February; went there to get money that was due me by the police department for services. My second visit was to see if I could get anything to do there. Think it was in the latter part of March. Went to the stable with Mosher to look at the horse and wagon before supper, between five and six; returned to the house in less than an hour. I went to Gilbert's that night because I didn't want to stop at my sister's when they were all gone. I told Superintendent Walling on August 18 that Bill was suspected of stealing Charley Ross; told him several times that I didn't believe it; can't say when I first believed it; had my doubts and my suspicions; my suspicions were, knowing him to be a man of very bad character. Am not in the custom of examining personals in the New York *Herald*. Never saw any other personals that I thought referred to the Ross case. Previous to that I know nothing about any negotiations going on only what Walling told me; that they were receiving letters here constantly, and that they were answered through the personals.

September 16.

JUDGE ELCOCK. One of the jurors has asked that I put the following question to accused: Did you, after you had been to Rondout with Mosher and Douglass, inform Captain Walling that you had been there with them?

Westervelt: I told him that we had been up the river and described the boat. I did not say we had been at Rondout for he did not ask me where I had seen the boat.

IN REBUTTAL.

William W. McLaughlin: I was an officer of the New York Police force last December when Captain Walling told me to go after Westervelt and tell him he wanted to see him at once. Found him at home; he did not tell me that he was just going up to see the Captain; it is not true that I met him within two blocks of Police head-quarters; nor is it true that I told him he had saved me the trouble of going to his house.

David Pooley: I live in Germantown. Have seen the prisoner there; it was the latter part of July or the beginning of August, 1874; was working for John Haines, repairing his dam; am a landscape gardener.

Cross-examined: I was on Haines street when I saw him; did not speak to him; saw him for about five minutes; noticed him because I thought he had a particularly heavy countenance; was riding, walking my team north-east; he was going the same way; he knocked at the door of a house; somebody came out and he went to another. Mr. Ross lives about a mile from me; knew that the child had been stolen, that rewards were of-

ferred, and that inquiries were being made about strange men being in Germantown, but never suspected he was the man; notice all strangers in Germantown with bad faces; the man had on a coat similar to prisoner; can't say about the hat or the pantaloons; he had a moustache, was sunburned; had whiskers, but none about his chin; his whiskers were dark brown, and about as long as they are now; didn't see him again until I saw him in the Court-room. The only opportunity I had of seeing him was the two or three minutes in Haines street, while passing along.

THE SPEECHES TO THE JURY.

September 18.

Mr. Brown inquired whether *Mr. Hagert* and *Mr. Sheppard* were going to address the Court for the prosecution or whether, in accordance with the rule of the Court, only one counsel on either side should speak. *Mr. Hagert* said that he saw no reason for a departure from the rule of the Court.

Mr. Brown said that it was his desire to address the Jury to vindicate his client and asked of the Judge if it was in the power of the Court to suspend the rule.

JUDGE ELCOCK said that it would afford him pleasure to grant the request but it was not within his power to do so unless the counsel on both sides agreed to it.

Mr. Sheppard and *Mr. Hagert* declined to accede to *Mr. Brown's* request.

Mr. Ford said that he as well as the prisoner in the dock sympathized deeply with the heart-stricken father. If during the course of his remarks he said anything that drove the arrow deeper in the heart of this bereaved man he would ask God to forgive him for the error, if such it was, proceeded from the lips alone and not from the heart.

In order to find him guilty he must have either actually abducted the child or assisted in its abduction within the jurisdiction of this Court. This also applied to the harboring and concealment of the child. It must be found, to convict on those two counts, that the offence was committed within the jurisdiction of this Court. The other three counts are conspiracy counts, but they all relate to this same matter of abduction and concealment and extortion; they

all relate to a conspiracy between Mosher, Douglass and Westervelt to commit this offence. I hold that a conspiracy is an agreement to do something in the future, not that it is a continuing offence, not that a man coming into it at a late hour can be held liable for all the acts of his co-conspirators, prior to his entering it, but that he can only be held for his acts subsequent to his entering into the conspiracy. We do not ask you to acquit the prisoner on any legal technicality, but we do ask you, if there is a doubt, if the scales of Justice can stand evenly poised, to throw that doubt in favor of the prisoner. If you believe from the evidence that William H. Westervelt ever had any hand whatsoever in the abduction and concealment of Charles Brewster Ross, I say, in God's name, convict him. He next referred to the evidence in the case which he said was only of a circumstantial character such as leads only to the inference of guilt. To convict on such evidence the consciences of the Jury must be convinced beyond the possibility of a doubt. No conjecture, no inference, would be sufficient; the conviction alone that the defendant was guilty as proven by the evidence would be sufficient.

He spoke of the removal of William H. Westervelt and his family to the city in January, 1874, and said that whilst it was for the purpose of bettering the condition of the unfortunate man who was then out of work, having been just discharged from the New York police force for a technical offence, it proved to be an unfortunate thing for him and his family as it led to his being charged with the crime he is now charged with, which crime, if you believe the evidence, was committed not by him but by his brother-in-law. The defendant moved on here on January 3, went to New York for a short time later to collect some money, saw some gas-burners which later he had sent on from there to him in Philadelphia. His wife went to New York in April and he followed her a week later. He made efforts to secure employment, but failed in obtaining it. He started out to make a living by selling some moth powder, made from a receipt of his brother-in-law's. Being well known in New

York, and too proud to go from door to door peddling he came to Philadelphia on June 25 to sell his powder here, but, finding no success he returned to New York. From that time up to the 7th of July you have heard of his whereabouts from the mouth of his good wife. She, he contended, had the dates and circumstances of those days impressed upon her mind by the pawning of articles to get food for their children, by the anniversary of her birth, and other circumstances important to her domestic circle. It was not to be argued until Gil Mosher asked Westervelt to send a letter to Bill Mosher that Westervelt suspected that the police wanted him, and even then thought it was for the Red Bank affair, and till Douglass on December 12 told him about the Ross abduction, continued in that belief, and that might account for the mystery in his actions and conversation with Walling. Up to April 13 Westervelt was in Walling's confidence, and gave him all the information that he possessed, and at the latter date he came on to Philadelphia at Walling's request, and was arrested and kept in confinement. He called attention to the fact that every witness called for the prosecution had contradicted some other one. The first time that Westervelt's name appears is when the witness Holland says he saw him on December 14 at Bay Ridge, at noon; and in this he is contradicted by officer McLaughlin, and corroborated by Hartman. He argued that the testimony showed that it was in June that defendant was in Philadelphia, and not in July. If there was a difference in the statements made by the witness, and on them a conviction was asked, the one made upon the stand under oath was the statement that the jury must take, and stigmatized the method of obtaining the statement at the Central Station as in nature French, where the prisoner is always supposed to be guilty until proved to be innocent.

The manner in which Westervelt was gotten here he termed kidnaping, and if Superintendent Walling and Captain Heins were on trial therefor, the jury could not help but convict them. He could find but few contradictions in all the statements made by the prisoner, and argued, there-

fore, that Westervelt, at all times, wanted to tell all he knew. The accounts of the interviews between Walling and Westervelt, as detailed by each, were compared, and he contended that all the probabilities were in favor of the correctness of Westervelt's account, and that his belief that the men were wanted only for the Red Bank affair accounted for his not telling certain things that he would have told if he had known that they were wanted in the Ross case.

Walling wanted to get the \$20,000, and that was the reason he tied Westervelt's hands as to the arrest of Douglass by making him agree to report only to him, and if Walling did use the information given him, the prisoner was not to blame. The non-calling of certain witnesses was criticised, and the identification of Bill Mosher's handwriting in the letters by Gil Mosher was pronounced ridiculous. He criticized the action of Superintendent Walling and Captain Heins in withholding from the public the 11th of September letter, and maintained that, from internal evidence in the case, and corroborating circumstances, the truth of Westervelt's statement as to the time of the Rondout trip was established. He had no doubt that Messrs. McDowell and Pooley had seen a man in Germantown such as they described, but they were led away by their imagination in identifying him with Westervelt. Pooley, especially, had seen the man but in passing him over a year ago, and yet this prisoner, since his imprisonment, had so changed that his wife scarcely knew him when she saw him in court. The circumstances attending Mrs. Spear's identification of the child and the prisoner were such, he contended, as to throw such a cloud of suspicion upon its correctness as to relieve the jury of the duty of considering it. Referring again to the conduct of Superintendent Walling and Captain Heins, he charged that their failure to arrest Mosher and Douglass was not a blunder, but a crime, and was inexplicable upon any other ground than that they were seeking the reward. He spoke in the highest terms of the character of Mr. McKean, but said he was not infallible, and Westervelt in the law was his peer, as he was the peer of his counsel and

the jury, and when the latter spoke of dates he was as likely, if not more so, to be right than Mr. McKean, who said he made no memoranda, and admitted having been excited and charging the prisoner with having stolen goods upon his person. After the treatment that the prisoner had received at all hands it was astonishing that he should voluntarily come to Philadelphia, and it was a proof of his innocence. He referred to particulars in which the witness Hartman was contradicted by other witnesses, and maintained that they were of such a character as to discredit his entire testimony. For the defence the witnesses were few, the prisoner having neither the power nor the means to bring witnesses from New York, but his first three witnesses proved conclusively he was not here at the time Mrs. Lyons says he was. He rehearsed in detail the important points in the testimony of Mrs. Westervelt and the prisoner, and reiterated and elaborated his reasons and conclusions why they were to be taken as correct. The treatment of the prisoner, in being kept in one station-house after another, without the ordinary accommodations of such places, and all to avoid the service of a writ of habeas corpus, and his commitment to prison and close confinement without the privilege of seeing any one but his counsel for five months, he denounced as unlawful and brutal, and charged that at the Central Station no effort was made to get a truthful statement from him, the desire being only to trip him up. If the event of his conviction was to be a revelation of the place of concealment of the child, would he in all these long five months have kept the secret locked in his breast? Douglass, the daily companion of Mosher, in his dying moments said that he did not know, and never did, the whereabouts of the child, and could the jury believe that if the prisoner had been a party to this abduction, he would have been intrusted with the knowledge that was withheld from Douglass, or that Douglass would not have said he was a party to it, or that he could have been a party to it without Douglass' knowledge?

If he had not been convinced that the prisoner was an innocent and a persecuted man, before he would have raised

his voice in his behalf he would have prayed God that his tongue might cleave to the roof of his mouth and that his right arm might wither. No one commiserated more the heart-broken parents of the child than the prisoner and his wife, and when the parents' prayers upborne on angels' wings ascended to the throne of the Highest they were accompanied by the orisons of Westervelt and his wife for the child's recovery.

Mr. Sheppard said that he hoped the counsel for the defendant would have explained the defendant's connection with Mosher and Douglass, but he had utterly failed to do it, and had not even attempted it. He had expended all his efforts on side issues, of which the jury must disabuse their minds, and had left the great mass of the testimony untouched. He had said that this was a case of circumstantial evidence, but it was not so. The words, the acts of this man, detailed by himself and others, brought the living man before the jury. The evidence is clear, positive and direct, but even if it were circumstantial evidence, agreeing as all the circumstances and details do, it would be irrefragable. Circumstantial evidence is the strongest that can be procured, and even the existence of a Supreme Being we only know from circumstantial evidence. In the Scriptures it is assumed, for "In the beginning God made heaven and earth." As to Westervelt's knowledge of these men, he said he knew it was not for the Red Bank affair that they were being sought for, and when he stood between them and the police he knew that he stood between them and Charley Ross. The point of time at which McLaughlin saw Westervelt when sent for him was not important; but the place was, and McLaughlin says that when he saw Westervelt at his house on the 14th of December, Mrs. Westervelt was sitting at a table, and they did not dare to call her to prove that it was not so. The statement made by the prisoner when under arrest at the Central Station, was made voluntarily after he had been told that he might or might not make it, and in his mind he was taking his chances when he made it. It was taken down phonographically as it fell from his lips, was

reported correctly, and the prisoner had not denied the correctness of a single word in that report. He denied that the prisoner had been treated outrageously, and said that the defence had not dared to bring experts to identify the handwriting of the letters to which they had argumentatively only taken exception. The witnesses Pooley and McDowell he knew to be respectable and honorable men, who would rather sever their right arms from their body than take the stand and say what was untrue. All the witnesses who had identified Westervelt had had an opportunity, day after day, while in court, to scan his features, and that was a very different thing from a first impression. In defence of Captain Heins and the police, he said that, since his official connection with the case, he knew that the Mayor, Captain Heins and the police had done all that could be done, and not a dollar was received by them therefor. He respected Captain Heins for his private character, and believed him to be as honest, able and faithful an officer as there was on the police force of Philadelphia or New York. He desired to publicly express his high appreciation of the efforts in this case of the Mayor, Captain Heins and the police, and he would not remain silent when they were assailed. Under the guise of a compliment, it had been endeavored to establish that Mr. McKean was unreliable and not to be believed, when Westervelt chose to attack him. If he took no memoranda, as it had been asserted, he was greatly surprised, for it was foreign to his habits. It was only when Mr. McKean remarked, "I said to a member of my family, some dates here are important," that the prisoner became alarmed, and then changed the date of the trip to Rondout. Westervelt coming here was an act of bluff, as he was merely anticipating a requisition. He disclaimed having or that he would ever have any secrets except such as official duty imposed, and none that he would be ashamed to disclose, and denied that the trial could have been sooner held.

Mr. Sheppard alluded to the testimony of Hartman, who saw the prisoner with Mosher and Douglass so often at Stromberg's saloon in the summer and fall of 1874, and to

whom the prisoner introduced these two men as Anderson and Smith; to whom he said, in reference to this crime, that he would "bet two shillings he could tell some of the parties that were into it;" whom he asked to tell him when he saw a chalk mark on the cellar door, so that he would know the parties were in town, and know where to find them. Just at this time one letter was received by Mr. Ross, purporting to come from New Haven, showing conclusively that they were not in New York, and that Westervelt knew. To Hartman he also said that if either of those parties should be arrested, the child would not live three days, and that Mosher had the child somewhere up the river. The letter of the abductor hereby threatened that the approach of a detective to place of concealment would be the signal for the child's instant destruction, and this threat ran all through the letters. How, then, did the prisoner get this thought, except from Mosher and Douglass? Mrs. Spear's testimony was of great significance. She got into the passenger car at Brooklyn on the fifth day after the abduction, and rode a distance of about four miles opposite this man, who had in his charge a child dressed in a linen suit and having no hat; and the demeanor of the two quickly told that mother that they were not father and child. The letters of the abductors showed that on the night of July 7, while passing through Trenton, Charley's hat fell off, and that he was dressed in a linen suit; and the nurse who dressed the child on the day of his disappearance told of his linen suit. This lady was thus corroborated by the nurse and by the abductors, and the only attempt to shake her testimony was an effort by the prisoner and his wife to establish an alibi on that day by statements so contradictory to each other that neither could stand against the other.

He did not desire to speak unkindly of Mrs. Westervelt, but there were features in her testimony which must be noticed. The object for which she was called to the stand evidently was to keep her husband at home during the first week in July, and to do this she undertook to locate him every day and night during the week, but for the week pre-

vicious to the First of July, and the week subsequent to the 6th she fails entirely, because during that week was the vital 6th on which her husband was seen with a strange child in a Brooklyn car. But there were marked differences between her account and his of the occurrences of that week. Her statement of particular dates all through her examination was in conflict, not only with her husband's, but with post-marks and other well-established facts in the cause. But, if she spoke honestly, she was grossly deceived by her husband, for she professed not to know that he was constantly seeing Mosher and Douglass, that he was acting with the police force, or, until she came to this city, that he had spent that memorable night of the 12th of September with Douglass. Was Westervelt doing an honest thing, and doing it in good faith? Then, if so, why deceive his wife? If he was doing a dishonest thing, and covering up a foul crime, then it was easily understood that he would keep her in perfect ignorance of his transactions.

The prisoner's own statement must be received with the closest scrutiny. He was the defendant; his trial was his strength with the Commonwealth and the law for his liberty, and what would not a man give and do for his liberty? And, hence, the probability was that, perhaps unconsciously, he was controlled by the great personal interest he had at stake. He had been well prepared; he had heard the entire case, felt more keenly an ugly fact than any other person possibly could have felt it, and he was an intelligent, cool, deliberate witness. But his statement at the Central Station, the accuracy of which had not been denied, and his testimony in court clashed all through. Yet even in his testimony here there were admissions that showed that he was lending himself to deception and fraud. There was the fraudulent letter concocted between him and Bill Mosher to Gil Mosher.

He wrote it at the dictation of Bill Mosher as if it were written in Philadelphia, and stating to Gil that he had neither money nor time to spare to go to the city of New York. He took that letter from Stromberg's saloon to Gil Mosher's wife, told her he had taken a letter from Gil to

Bill and had received an answer, and then handed her the letter. Why did he not let Bill Mosher write that letter? Because, he said, Bill was too nervous. Too nervous! What could make that man nervous, who was almost kyanized in crime? No, there was a real reason for his becoming the amanuensis of the abductor.

Bill Mosher's handwriting was wanted, Walling had told him about it, and inquiries of it had been made of Gil's wife and of Madame Morrow and, therefore, when he said he would write a note to Gil, Westervelt stayed his hand and himself wrote the note, thus attempting to keep from the authorities that which they seriously sought; then he admitted that he withheld from the authorities the fact that after his sister's return to New York Mosher and Douglass were at his house. For weeks he failed to tell Walling where these men had lived in Philadelphia.

Westervelt and Mosher were thoroughly intimate and cognizant of each other's acts and that shows there existed relations between them which do not appear on the surface. Mosher gives him a letter to carry; shows him the horse and wagon in which the child is to be carried away; Westervelt seeks to discover if Mosher's house is watched; he comes to Philadelphia to take care of Mosher's family and when they flee to New York, Mosher places them in Westervelt's house, knowing that it is a safe place for them to go to. They reside there unreported; Moser visits them there; Westervelt meets them by appointment; Douglas tells Westervelt their future plans about the child—all showing that there was a bond and a link between them which satisfied them Westervelt would not betray them. If they had not understood each other and had confidence in each other Douglas would not have unbosomed himself and told him what Westervelt says he told him. All these facts are inexplicable upon any other theory than that of a relation between them which satisfied them that this man would not "give them away". There were two agencies at work in this case: The Ross family working through the police and the abductors through the letters. Westervelt comes in just where he is wanted.

He gives Mr. Walling sufficient information to keep the police employed, while in the meantime the letters keep flowing in. Having referred to the facts of the case I have not endeavored to allude to any matters which would influence your passions: God knows there is enough inflammable matter in the case. I ask your attention to the evidence itself and to the law bearing upon it. I ask you to consider that evidence and to determine from it this transaction and not to be mislead by any false colors thrown over it; and in the name of Providence I trust that your deliberations may have a power over future transactions that may be a source of congratulation to you on future occasions.

THE JUDGE'S CHARGE.

JUDGE ELCOCK: Gentlemen of the jury—you are to be congratulated upon the near termination of your public duty, and I thank you for the patience and marked attention which you have, through this long trial, given to the evidence and arguments. I am sure that patience and attention will be continued until you reach that conscientious conclusion which shall satisfy truth and justice in this important case.

Upon the first day of July, 1874, Charles Brewster Ross, a child of about four years of age, the son of Christian K. and Sarah Ann Ross, was kidnaped from his home, in Washington lane, Germantown, in this city. That kidnaping, or taking and carrying away of the child, and his subsequent concealment and detention, has been regarded as the worst crime of the century. The assassin's knife has created no such wide-spread terror. It has made every father and mother in the land tremble lest the grasp of some fiend in human shape, following this successful example (for successful crimes are oft repeated), should carry away to a fate worse than death, one of the children of their hearts. A father's broken spirit, a mother, true to a mother's love, looking with hope into the darkness of the future, yet doubting hope, still crying for the return of her son, the whole

people indignant at the weakness of police authority, a child of freedom restrained of his liberty, perhaps deprived of his life, are some of the results of this abduction. This continent confines not the anxious hearts looking for the return of Charley Ross, for his wrongs have travelled the seas to foreign lands, and yet the mystery of his whereabouts is, to this hour, with shame be it said, unsolved.

The Commonwealth asks you to infer from the evidence presented to you that the prisoner was a conspirator, acting the part of harboring, concealing and detaining the child, knowing it to have been kidnaped. Of protecting and concealing the kidnapers by giving them information of the search for them, and for the child. Of misleading the police authorities of New York, by false information, and concealing information which he had agreed to furnish and upon which he knew they relied. Of preventing search for those having the custody of the child by artful concealment and deceptive information. Of false information to those interested here in the recovery of the child for the purpose of concealing it and those having it in charge, and that, knowing of the whereabouts of the child and in whose custody it was, he concealed, and harbored the child and protected those having him in their custody from detection and arrest.

The testimony going to show these facts is in the main circumstantial or inferential; and you are asked to infer it from evidence directed to show the prisoner's relationship and associations with the abductors. His association with them knowing them to be thieves. His association with them after he knew of their being the abductors. His being in Philadelphia with them, residing in the same house with them. His being in the same business (sale of mothee) with them. His knowledge of the horse and wagon in which the child was carried away and his concealment of that knowledge. His being in Philadelphia, associating with Mosher and Douglass a short time before the abduction. His spending the evening with Mosher and Douglass at Gilbert's at Eighth and Girard avenue, about which he has made a false statement. His numerous meetings at Stromberg's saloon in

New York with Mosher and Douglass. His visits to Rondout with Mosher and Douglass. His carrying a letter from here to New York to mail to Rondout. His agreement with Walling to furnish information as to the whereabouts of Mosher and Douglass. His hesitation about making such an agreement. His failure to furnish information when he was possessed fully of their whereabouts. His objection to having his house watched and threatening to conceal information. His reporting falsely to Walling about the boat. His informing Mosher and Douglass of their being suspected. His visit to Philadelphia at the expense of Mosher, to bring on his family and publish the personal, "Napoleon, I have seen them! All is well."

These are some of the facts which, when linked together in their regular order, as has been shown to you, you are asked to infer that a conspiracy existed between Mosher, Douglass and the prisoner. You have heard the arguments in favor of the theory on these facts; is it consistent, true and natural? Does it expel every other theory to be drawn from these facts? They are all circumstances which require to be well considered. Their weight, importance, unity, and truth are for you. Truth and justice may be reached by circumstantial evidence as well as by direct; indeed, a chain of circumstances, each link founded in truth and tested by the rules of law, has ever been regarded as the strongest kind of proof.

The evidence of the prisoner consists of his own testimony, corroborated by his wife on one important point, I think, but that is for you, and by Mrs. O'Leary and Kate Morgan as to not seeing him here on the middle of July, 1874. The prisoner having decided to become a witness, subjects himself to the strictest rules of evidence; having ventured to answer, he must answer and explain fully his case. His defence consists of asserting the entire fallacy of the statements of the witnesses for the Commonwealth as applied to him, and consequently the wrong theory sought to be established against him. He denies his intimacy and friendship with Mosher and Douglass. He denies associating with them.

He denies being in Philadelphia in the middle of July or latter part of July or fore-part of August. He admits that he did not report to Walling his meetings with Douglass and Mosher. He denies being in a Brooklyn street car on July 6, 1874, with a child. He denies the statement made by Officer King. He denies the statement made by Officer Titus. He denies seeing Mr. McDowell in Germantown or ever being there. He denies the statements made by Hartman, as to the signal-marks on the cellar door. He denies that he ever used the expression to Hartman about the whereabouts of the child, "I will never tell." He denies that he made the statements testified to by Mr. McKean. And other facts which you can doubtless recall. I do not profess to be accurate in these recitals of facts. In a word, if you believe the testimony of the prisoner the case of the Commonwealth is annihilated. The links are broken and its theory destroyed. But you must review this testimony with great care. The prisoner's interest is great, but if truthful, it should only weigh against him as a question of interest.

But if, in the investigation of all the facts, you find a witness who has stated some material facts which are not truthful, then his whole testimony must be cast out, no matter on which side his evidence rests, for the maxim of the law is, false in one particular, false in all. You cannot reconcile truth and falsehood in one witness; but be certain of the falsehood, for an inaccurate statement, not to the essence of the offence or mistaken data in many other questions, may be only errors of memory, which are not falsehoods. And a witness' character cannot be assailed or his testimony questioned except by evidence in the cause.

I do not propose to review this testimony; that has been done with great ability by the able counsel both for the Commonwealth and the defendant; and if I attempted it, it might be only to create in your minds a bias upon facts which you should not derive from the Court. You must guard yourselves against any opinion which you may conceive and have upon the facts or testimony in the case. Your power is to decide the facts and it is a high and responsible duty

which should not be infringed upon by the Court or any other influence. My duty is to instruct you upon the law of the case and that you are bound to take from me without doubt or hesitation. If I err a higher tribunal corrects me. Review the testimony with calm judgment and fear not to apply every test to its accuracy. You are to decide by the testimony; if to find the prisoner guilty it must be beyond a reasonable doubt or he goes free. Give him that doubt, if it be an honest, manly doubt, derived from the whole testimony; but do not manufacture it from weakness or sympathy, either for himself or his family, for this is no hour for sympathy. Whilst you have gazed upon that scene of misery surrounding that prisoner's dock for three weeks, you must recollect that if there he guilt upon that brow, that for one year and two months the voice of Charley Ross has been lost to his home and that while the prisoner has his children in life around him, another father mourns his son through this terrible crime.

THE VERDICT AND SENTENCE.

At a quarter after seven o'clock the jury retired and a recess until half after nine was taken. At ten minutes of ten the jury came in and asked if they could act separately on the different counts.

JUDGE ELCOCK: Yes, you can do that; you can acquit on the first two counts, and convict on the last three; or you can convict on the first which will substantially cover the others. In either event the punishment will be the same.

Mr. Ford: Will your honor also say that they can acquit?

JUDGE ELCOCK: I can say nothing. This is strictly a matter between the Court and jury.

The jury then retired. At ten o'clock p. m. no verdict having been reached the Court adjourned.

October 9.

This morning the jury brought in a verdict of guilty on the third, fourth and fifth counts.

JUDGE ELCOCK: I have carefully considered the reasons

filed in support of the motion for a new trial. As they embrace only objections to the rulings of the Court and they have all been fully discussed during the trial, I have concluded to refuse the motion.

Westervelt, stand up.

Prisoner at the bar, a jury of unusual intelligence and character has found you guilty of conspiring with William Mosher and Joseph Douglass and others to kidnap and carry away, and after abduction, to harbor, conceal and detain the child Charles Brewster Ross, and of consummating the afore-said crime in pursuance of said conspiracy. That you were defended by your counsel with great vigor and ability was pleasing to the Court and should be gratifying and satisfactory to you. They labored with a zeal and devotion which entitle them to great praise, for they protected and guarded you in all your rights. The Court has fully considered your case, both as to the law pronounced upon the trial, and the evidence submitted to the jury. I have given it a calm, conscientious review, and am fully satisfied with my rulings upon the law and conclusion arrived at by the jury. It is such a verdict as I would have joined in had I been a juror. I need not dwell upon the enormity of the offence of which you have been convicted. You have had full time to realize its darkness and your own fate. I had hoped ere this I should have been appealed to for a light sentence by some merciful cry revealing something of the fate of Charley Ross, but I have heard not even a whisper, nor beheld a ray of hope, and if the knowledge of his fate rests with you, then you become your own executioner. Justice calls loudly for your severe punishment and it remains but for me to announce its sentence. By act of Assembly of 5th April, 1790, all crimes not capital, for which by the law then in force "burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, whipping and imprisonment for life" were inflicted as a punishment, was changed to a punishment by solitary imprisonment at hard labor for a term of not exceeding two years. By an act of

Assembly April 4, 1807, the punishment was extended to an imprisonment not exceeding seven years, and by decisions of our Supreme Court the punishment for conspiracy to commit an offence cannot exceed that for the successful perpetration of the same offence. You are therefore, punishable under the act last cited. The sentence of the Court is that you pay a fine of \$1, the costs of prosecution, and that you undergo an imprisonment at solitary confinement at labor, in the Eastern Penitentiary for the term of seven years, and that you stand committed until that sentence be complied with.

THE TRIAL OF MARY HARRIS FOR THE
MURDER OF ADONIRAM J. BURROUGHS,
WASHINGTON, D. C., 1865.

THE NARRATIVE.

Mary Harris, a girl of Irish parentage, at the age of nine was employed in a small fancy-goods store, kept by a woman, in Burlington, Iowa. There she attracted the attention of a young man named Adoniram J. Burroughs, who for four years saw her constantly and gained her implicit confidence. He then removed to Chicago from which place he wrote her frequently, giving her advice, telling her all his troubles and expressing his love and admiration for her in the most endearing terms. When she reached the age of eighteen he induced her to go to Chicago and obtain employment in a store there, and it was generally understood by her friends that they were to be married at once. On account of his failure to raise a company and obtain a commission in the army, he removed to Washington where he secured a clerkship in the Treasury Department. She continued in the Chicago store and to receive love letters from him. Some time after, there came to her two letters signed J. P. Greenwood, a name unknown to her, requesting her to meet the writer at a house which on inquiry proved to be one of ill fame. Accompanied by a female friend she made inquiry there as to the person who had requested the meeting and the keeper of the place from a photograph shown her identified him as Burroughs. A postoffice clerk supported her opinion, and on the trial the Greenwood letters were proved by several witnesses to be in the handwriting of Burroughs. She learned later that he was in Chicago on that day. And not long after that he had married another.

This rendered her frantic; it seemed to change her whole character; she became quarrelsome and abusive and even attacked with a knife one of her closest friends. She left Chicago for Washington, stating that she was going to bring an action for breach of promise of marriage, but when she reached there she went to the Treasury Building, inquired where Burroughs' office was, waited in the corridor until he came out and then shot him.

On the trial the plea of insanity was set up and though the brother of her victim, a clergyman and President of the University of Chicago, swore that the "Greenwood" letters were not in his handwriting and that he was not in Chicago on the days they were written, and though there was no evidence that he had wronged her in any way, and no direct proof that he had even promised to marry her, her leading counsel, Daniel W. Voorhees, in a passionate and eloquent speech, which caused the jurors to shed tears, was able to obtain a very prompt verdict of not guilty.

THE TRIAL.¹

In the Supreme Court of the District of Columbia, Washington, D. C., July, 1865.

HON. ANDREW WYLIE,² *Associate Justice.*

July 3.

*Edward C. Carrington,*³ *District Attorney and Nathaniel Wilson*⁴ *for the Government; Joseph H. Bradley,*⁵ *Daniel*

¹ *Bibliography.* Official report of the trial of Mary Harris, indicted for the murder of Adoniram J. Burroughs, before the Supreme Court of the District of Columbia (sitting as a criminal court), Monday, July 3, 1865. Prepared by James O. Clephane, official reporter. Washington, D. C.: W. H. & O. H. Morrison. 1865.

² See 8 Am. St. Tr., 651.

³ See 9 Am. St. Tr. 4.

⁴ See 9 Am. St. Tr. 4.

⁵ See 9 Am. St. Tr. 4.

W. Voorhees,⁶ James Hughes,⁷ Charles Mason⁸ and William Y. Fendall⁹ for the Prisoner.

Mary Harris having been previously indicted and pleaded not guilty to the charge of having on or about January 30, 1865, murdered Adoniram J. Burroughs, the trial began today.

The following jurors were selected and sworn: Moses T. Parker, Thomas H. Barron, Francis Ballinger, Michael R. Coombs, Alexander Lammond, Thomas A. Tolson, John Scrivenner, Butler Baker, Donald McCathran and Zack B. Brooke.

July 7.

The court-room today was crowded to excess, nearly all the members of the Bar of the city being present.

THE DISTRICT ATTORNEY'S OPENING.

Mr. Carrington. Gentlemen: You have been subjected to a very searching examination by the Court, and in reply to the questions of his honor, you have stated that you have no prejudice against the prisoner at the bar. (Turning toward the prisoner.) I am sure of this. How could you have? For she is a woman, and a woman in distress; enough to commend her to the commiseration, if not to the sympathy, of every generous and noble-hearted man. On the other hand you have sworn with equal emphasis and solemnity, that you have no prejudice in her favor, and no conscientious scruples in regard to the subject of capital punishment. In a

⁶ See 6 Am. St. Tr. 816.

⁷ HUGHES, JAMES. Born 1823, Hampstead, Md. Grad. Univ. of Indiana and was admitted to bar. Served as an officer in the Mexican War. Circuit Judge (Ind.) 1852. Professor of Law, Univ. of Ind. 1853-1856. Representative in Congress 1857-1859. Judge Court of Claims, 1861-1865. Practiced law in Washington and later was a member of the Indiana Legislature.

⁸ MASON, CHARLES (1804-1882). Born Pompey, N. Y. Editor N. Y. Evening Post 1837. Judge Supreme Court, Iowa 1838-1847. Commissioner to Draft Code, 1849. Judge Des Moines County Court 1852. U. S. Commr. of Patents, 1853-1857.

⁹ FENDALL, WILLIAM Y. Lawyer, Washington, D. C. Practiced from 1858 to 1871. Son of well-known lawyer, Philip Ricard Fendall (1794-1868) of Alexandria, Va. Died, Washington, D. C., Nov., 1871. See Washington Star, Nov. 17, 1871; The Daily National Republican, Nov. 16, 1871; Washington directory, 1858-1871.

word you have sworn that your minds were like blank pieces of paper, so far as the transaction of this case is concerned; ready, for the first time, to receive impressions, and to discharge the high and awful duty which devolves upon you in a spirit of perfect impartiality, both to the public and the accused, and to execute the law as it is, without reference to your peculiar views as to what it should be; and you have invoked the Almighty and this cloud of witnesses to attest the sincerity of that solemn and impressive oath. Be it said to the eternal honor of the American people that a man in danger is never, in this country, without a friend and a protector.

I stand here to-day to plead the cause of woman—gentle, lovely, virtuous woman—associated in our minds, from earliest infancy, with all that is good, amiable, and attractive. Woman, more than man, is interested in the preservation of peace and order, and in the enforcement of the law. To consign an innocent woman to a false doom would be horrible, indeed! To allow a great crime to go unrebuked, because the guilty agent happened to be a woman, would be an act of cowardice, a criminal imbecility. The prosecuting officer who, from a feeling of sympathy, fails to state the law with perfect candor, is recreant to his trust; the witness who, from sympathy, testifies untruly, stains his soul with perjury; and the juror who, from sympathy, renders a verdict inconsistent with the law and the evidence, commits the same awful crime in the sight of God and his country. Obedience to law is the safeguard of us all. We must be cruel only to be kind; we must punish the guilty, in order to protect the innocent. Loyalty to law and government is obedience to Heaven. Crime must be punished because God commands it.

It is my duty, at this stage of the case, briefly to state certain great principles of law by which you are to be guided and controlled in this investigation.

Four questions are submitted to you for your consideration. 1st, Was the homicide charged in this indictment committed within the jurisdiction of this court? 2d, If so, was it committed by the prisoner at the bar? 3d, Is it felonious, justifiable, or excusable? 4th, And, if felonious, what is the quality of the homicide? Is it murder, or is it manslaughter?—there being no grades of murder in the District of Columbia, as there are in many of the states of the Union. Again, every homicide is presumed to be felonious murder until the contrary appear from the evidence. Therefore, if I show this homicide was committed by the prisoner, the burden of proof will be upon her, to show that it was either excusable, or, if felonious, was committed under such circumstances as, in the judgment of law, would mitigate the offense from murder to manslaughter.

I have said that every felonious homicide is presumed to be murder, and the burden of proof rests upon the accused, to show those circumstances which will mitigate a felonious homicide from murder to manslaughter. What circumstances will reduce a

felonious murder from murder to manslaughter is a question of fact for the jury. It is a vulgar error, that where a party takes life in passion, it is manslaughter. There must be provocation, and a sufficient and recent provocation, to justify that passion. Both passion and provocation must concur. A man may take the life of another in the tempest and whirlwind of passion; but it is still murder, unless it result from provocation. And that provocation must not only be sufficient, but recent; for if there is sufficient time for passion to subside and reason to resume its sway, it is still murder. What is sufficient cooling-time, is a question of law for the court; whether the facts show sufficient cooling-time, is a question for the jury.

I recognize before me many gentlemen who are not without experience in the trial of criminal causes. I deem it unnecessary, therefore, gentlemen of the jury, to define or to analyze the crime of murder. Justifiable homicide is where an officer takes life, when it becomes necessary, in the discharge of his official duty. Excusable homicide is, first, where a party takes life when it is necessary to protect his own life or his person from great bodily harm, or where the circumstances are such, in the opinion of the jury, as to justify the honest belief that such necessity exists; or to protect one standing in that intimate relation which the law permits him to defend. For instance, a parent his child, a husband his wife, a master his servant, a guardian his ward, *vice versa*. Again, where the party's mind is so affected by disease, resulting either from moral or physical causes, or both combined, as to render him an irresponsible being, this is called excusable homicide by reason of insanity. It is a vulgar error that insanity renders a party irresponsible for his conduct. This is not so, gentlemen of the jury. Every man who commits crime is at the time more or less insane. Passion is temporary insanity. Reason is for the time dethroned, and passion holds the sway; but in order to acquit a party upon the ground of insanity you must be satisfied from the evidence that the mind was so affected as to render the party incapable of distinguishing between right and wrong as to the act committed; or that the will was so affected as to be entirely beyond his control; rendering him a mere automaton, and his acts involuntary. Motive, therefore, you will observe, is utterly incompatible with the idea of insanity. If it appear, therefore, from the evidence, that this homicide was committed in a spirit of revenge—to avenge some wrong—it is a death blow to the plea of insanity.

Again, it is my duty to remind you that if you acquit the party upon the ground of insanity, you should find that verdict special: not guilty by reason of insanity; in order that the Judge may certify the fact to the Secretary of the Interior, and have the unfortunate accused confined within the walls of the insane asylum. I shall say no more upon this point at present.

Of course it is not for me to anticipate the defense. I am merely stating general principles. If this appears from the evi-

dence to be a case neither of justifiable nor excusable homicide, the next question to be considered by the jury will be whether this be murder or manslaughter. You will observe from the definition of these two grades of offense, that malice is the distinguishing characteristic. Felonious homicide, with malice either expressed, or implied, is murder; felonious homicide, without malice expressed or implied, is manslaughter. Malice is a technical term and has a technical signification. It is of two kinds: Implied malice, or malice in law, is where a party takes life wantonly, that is to say, without sufficient excuse in law; and it does not imply either hatred, envy, or revenge. Hatred is a feeling of hostility against some particular person. Envy is a feeling of chagrin and mortification at the real or supposed superiority of another. Revenge is that red and bloody demon lurking in every depraved and malignant heart, prompting to those crimes that shock and outrage human nature. Malice in law is that quality or feeling of the human heart which permits a man to injure another whom he neither hates nor envies, and against whom he has no grudge, and whom, perhaps, he has never seen. Malice in fact is malice in the ordinary acceptation of the term, and not unfrequently implies hatred, envy, and revenge, and is manifested by lying in wait for the party injured, or by antecedent threats and menaces.

Having briefly stated these general principles, which I may have occasion hereafter more fully to illustrate and elaborate under the instructions of the Court, I shall proceed to briefly recapitulate the facts in the case which you are sworn to try. I know nothing of my own personal knowledge, but from information received, I think I am warranted in saying you never tried a similar case before. It is unprecedented in the annals of crime. We expect to show that the prisoner at the bar armed herself with a deadly weapon in the city of Chicago, that she came to Washington, repaired to the Treasury building, and inquired of the doorkeeper for Mr. Burroughs. That she was received with that kindness and courtesy characteristic of the American people in any position of life, whenever approached by a lady, or one bearing the appearance of a lady. The doorkeeper told her that there were two persons of that name employed in the Treasury Department. She looked at the book where the names of the employees were recorded, and turning to the name of Adoniram J. Burroughs, said *he* was the gentleman whom she desired to see. She went to the room, turned the bolt, when she saw the object of her search, standing at his desk in the discharge of official duty. An old lady sitting by, attracted by the bright lustre of her black eye, rose from her seat, and was about to ask her in.

Her envy was excited. Good heavens! what was there to excite this unchristian and pitiable spirit? However, she measured him, she marked him, she resolved upon his death; she retraced her steps down the hall, then turning to the left she took her stand behind a high clock, which reaches from the floor almost to the

ceiling. Here she sat awaiting the approach of her unsuspecting victim. Great God! what a position for a woman! Armed with a deadly weapon, and with malice in her heart, in a public building in the metropolis of a Christian nation, stands an American woman contemplating the crime of murder. She could hear the ticking of the clock; she could observe the movements of the hands; there was time for passion to subside and for reason to resume its sway. One would suppose that she could have seen with the eye of fancy the wife pointing to her child, and hear her voice:

"Oh! thinkest thou not how wretched we should be,
A widow I, and helpless orphan he?"

The clock strikes; the labors of the day are ended. The clerks are returning to their respective places of abode. Young Burroughs, full of life, and joy, and hope, is going to his home, where his faithful wife, an honest, true-hearted woman, is anxiously expecting her husband's return, unconscious of the slightest design upon his life or personal safety. *Heu mens hominum nescia futuri.* Alas! alas! how ignorant of the terrible fate that awaits him, for almost at that very moment the instrument of death is pointed at his back by the assassin's hand. He is walking down the hall in company with a friend, engaged in conversation. As he passes the clock the prisoner draws her pistol, and without a word of warning or of notice, aims and fires, inflicting a mortal wound. He reels, exclaims "Oh," turns again, and endeavors to make his escape. Was not that enough to satisfy the assassin's revenge? No, gentlemen of the jury; she steps into the center of the hall, deliberately cocks her pistol, and aims directly at his head, as will appear from the impression made upon the wall, which will remain a lasting memorial of this cruel and bloody tragedy. But this was a useless expenditure of ammunition. Her object was accomplished, her revenge was satisfied; the body of her victim lies bleeding at her feet. You see the flash, you hear the report, and in a moment the poor trembling spirit of Adoniram J. Burroughs stands affrighted and appalled before the bar of eternal justice. Horrible, horrible, most horrible! Cut off in the very blossom of his sins, no reckoning made, unhouseled, and unanointed, he goes to his long account with all his imperfections on his head.

She is arrested; still she is calm, cool, and collected; showing no emotion, until the mangled and bleeding corpse of her victim is brought into her presence. Then she begins to cry and tear her hair. In the strong and expressive language of this indictment, "moved and seduced by the devil," she commits the murder; but, when the deed is done, the devil leaves her, and she hears the voice of her God, "Thou shalt do no murder." She sounds the alarm, and then she suffers, in anticipation of the awful retribution of an outraged and violated law.

"Revenge, sweet at first, bitter ere long,
Back on itself recoils."

Is this some terrible dream?

I have stated to you that I know nothing of my own personal knowledge. I never saw the prisoner until she was brought into the presence of the Court. But, if these facts appear in evidence, shall I insult your intelligence by arguing that this is a case of murder—wilful, deliberate, cold-blooded murder—aggravated by cruelty, barbarity, and a savage disregard of human life, unrelieved by a single circumstance? To call it by any other name would be a libel upon the religion and the laws of that God we adore, and the country we love.

Why did the prisoner at the bar not kill him in Chicago, if she had suffered any wrong, either real or imaginary, at his hands? Ah, gentlemen, did she suppose, as many others do, that here crime could be committed with impunity? As a citizen of Washington, as an American lawyer, proud of my country and her institutions, I hope this error will be corrected; for this is the metropolis of the nation, the great radiating point, and strangers from abroad judge of the habits, customs, and manners of our people from the citizens of the federal metropolis.

Unfortunately for us, the city of Washington has acquired the reputation abroad of being the city of licentiousness, violence, and crime. Now, as on former occasions, I repudiate this slander upon the people of my adopted home, where I have so long resided. The citizens of Washington are a law-loving, law-abiding, religious people, and we are indebted to eminent criminals, who come from a distance, for this unenviable reputation. It is the rendezvous for thieves, garroters, murderers, and adventurers. The city swarms with wicked men and women; and public safety depends upon the firmness and integrity of the judiciary.

We have no representation in Congress; we are to a great extent in the power and under the influence of the States. But I charge you, gentlemen of the jury, maintain your dignity and your self-respect. Let it no longer be considered that crime may be committed with impunity in the national metropolis, and that jurors will refuse to discharge their duty with firmness and fidelity.

MR. BRADLEY'S OPENING.

Mr. Bradley. Gentlemen: I have nothing to say to you, gentlemen of the jury, on behalf of the prisoner as a young lady, or even as a woman, nor have I any appeal to make to you on the ground of chivalry or of manhood. Those are questions outside of the present inquiry. I shall call upon you to decide this case upon the facts as they shall be presented to you from the written and oral proof, and if the accused, in your judgment, shall be possessed of one tithe of the guilt just now attributed to her by the District Attorney, I shall join him and ask for her condemnation, and that she shall suffer the severest penalty.

The prisoner is of Irish descent. She has had few advantages of early education and moral culture. When about nine years of age, she was a little girl employed in a store kept by a lady in Burlington, Iowa—a millinery and fancy store, where some gentlemen's belongings were kept, such as pocket handkerchiefs, neckties, &c. While there she first attracted the attention of the deceased. She was then a bright and beautiful child, he fondled her as such, and she returned his caresses.

The lady with whom she was thus employed is represented as one of refinement and culture, mingling in the society of the place, and in every respect admirably fitted for the training of such a child. Burroughs was at that time engaged in business, keeping a store not far from the one in which the accused was thus employed, and passed by that store every day. He was frequently in the store obtaining articles of gentlemen's wear and use, and was received by the lady on the footing of a friend. This course of life continued some two or three years, when he failed in business. He was then employed by this lady to keep and post her books, and thus was thrown more closely into the society and association of the accused. Time passed on. He left the city of Burlington, where she resided, and on the 1st of November, 1858, wrote to the accused the first letter which ever passed between them. That letter will be offered in evidence. At this time she was about thirteen years of age; not more. He was a man of education and knowledge of the world, her senior at that time of more than double her years. He had during the acquaintance between them, cultivated her intellect, and assisted in refining her manners, and thus she became fitted for, and was admitted into, the best society of Burlington. From that time forth, so long as she continued to reside in Burlington, she was received as the friend of ladies of the highest character and repute, well known in that town. Her associations were with the children of these ladies, principally among married ladies, and of persons older than herself. She went very little into general society. The correspondence thus begun was continued for five years. So much of that will be laid before you as will enable you to see the character of the relations existing between the parties. I have here ninety-two letters, taken from the correspondence, extending from the year 1858, and including the year 1863. They will show how by degrees he formed, shaped, and moulded her mind, feelings, habits, tastes, and her intellectual and moral character. They will show how completely she was identified with all his life; that he took no grave step in life without first communicating to her. All his hopes, fears, and disappointments, were found out in this correspondence, and in the interviews which from time to time were referred to in it. His expectations and prospects were disappointed. He had a quarrel in Burlington, and was dismissed from his church. He poured out into her ear all his grief and suffering, and although at first she did not even like him, yet by degrees, as time passed, she

began to believe that he was persecuted and trodden down. She believed him a good man in adversity. He was always good to her. Her liking increased until at last she began to love; and when she gave her heart she gave her whole soul with it. She thought and acted as and for him. She trusted with the whole trust of a woman's confidence when once given. Her father disapproved of this correspondence, disapproved of the man; interfered, prohibited, and attempted to prevent. He did prevent his visits at his house, and treated her with some severity. They then poured the tale of their love and their difficulties into the ear of one of the most intelligent, refined, and estimable ladies of that town, and she permitted them to visit at her house. He persuaded the accused to leave her father's house and go to Chicago in search of employment, in which city he was residing, and where he was looking forward to the formation of a military company to go into the service of the United States. She did so. His attentions to her there were such that one of her employers, a gentleman keeping the principal book-store in that city, remonstrated with the brother of the deceased. Shortly afterwards, or about that time, she left Chicago and returned to her father's house. She remained in Burlington for some time afterwards, retaining all her former associations, becoming more and more endeared to the ladies with whom she was thus associated, until again, in the spring of 1863, he prevailed on her once more to go to Chicago, where he was then residing, to seek employment there. Previous to that time he had in the most distinct terms committed to a lady, whose testimony will be presented to you, the fact of a marriage engagement existing between himself and the accused. The day was fixed for the celebration of the marriage. His plan was, if he succeeded in forming this company, and was mustered into the service, to marry then; but as her parents were so much opposed to her marrying him, they being Catholics and he a Baptist, he determined if he did not succeed in the formation of this company, thus obtaining a subsistence for himself and wife, to go to California, or some other place remote from the town of Burlington. All this was communicated to this lady. He was disappointed by accident in his expectation of going into the military service, and the marriage was postponed. Subsequently the day was fixed, and when she returned from Chicago the first time she was accompanied by him; and he then told this lady, as his excuse for his return to Burlington, that he did not wish his wife to be employed any longer as a clerk. They were then to be married within three weeks. At a subsequent period, as is shown in one of his letters, the fact of her intended marriage out of the church was discovered by her priest, and in that letter he inveighs in strong terms against the espionage upon the correspondence which was then carried on between him and her. Subsequently to this, and after her return to Chicago in the spring of 1863, the period of her marriage was fixed in the month of June of that year. He came to Washington in search of employment, and ob-

tained it in one of the public offices, and then, instead of writing to her to make her arrangements for marriage, he wrote to her, proposing, if she would come to Washington, to obtain employment for her in one of the public departments. Not a word was said of marriage. This was the first incident in the course of their long correspondence and intercourse which startled her, and led her to entertain the first doubt of the character of the professions he had made her. That letter was communicated to her friend in Burlington. The last time they were seen before that visit to Washington they were in such a position to each other as could only be excused or justified by the relations then subsisting between them of an actual engagement of marriage within a short time. She sitting on his knee; he playing with her curls; she a young girl, 17 years of age, pure and spotless; he a man well known in society, with long experience in the ways of the world—a man of education and refinement. The summer of 1863 passed, and in August she received a letter from him dated the 7th of August, which will be read to the jury, asking her for an interview, and where he could meet her. I omitted to state that shortly after her arrival in Chicago, in the spring of 1863, she formed the acquaintance of the two Misses Devlin, who had gone from Baltimore with means to establish themselves in the millinery and fancy goods business in the city of Chicago. The accused at that time wrote rapidly and an excellent hand, and had had some experience under her former instructor in book-keeping. She was taken into the employment of the Misses Devlin as clerk and book-keeper, and occasionally assistant saleswoman. She was with them when the deceased parted from her to come to Washington, and with them she has lived until the 30th day of January last. She has occupied the same chamber with both, and the same bed with Miss Louisa Devlin from that time during the whole time she was with them. During that summer she received few attentions; went out but little; in fact her life was spent in her correspondence and looking forward to the fruits of that correspondence—a union with the deceased. Her spirits were cheerful and happy—bird-like; her manner full of life and animation. The live-long day was a day of happiness to her. Not a cloud darkened her prospects, and she expected in June of that year to be married and come to Washington to live. The summer passed, until the receipt of the letter in August, in the fond hope of their being married. She was at that time in high health, fleshy beyond the ordinary degree of girls of her age, of high, pure, healthy color, attractive, yet, as I have said, not seeking society, but living within herself, and with the two friends whom she had thus made. On the receipt of this letter of the 7th of August, she answered him, and told him where she was residing with the Misses Devlin, and that he could meet her at their store on the Sunday following. She and the Misses Devlin were at the store. He did not come; but a day or two afterwards he did come in the evening, and spent more than an hour in

company with the accused, during the greater part of which time he held her hand. They were within the view of the two Misses Devlin all the time, and they spoke of the interview as an interview between lovers. They parted as friends, with his promise to see her the next day or the day after, and she with the expectation of seeing him, and having an opportunity to hear from him more fully the history of his prospects and his condition, and to have the period of that marriage finally fixed.

She heard no more from him until she received a letter dated the 24th of August, written in terms of warm friendship, and speaking of the long correspondence which had passed between them, and of his failure to fulfill their engagements by reason of his want of means; speaking of the strength of his friendship for her, and declaring that, but for the adverse fortunes which had pursued him, she should have shared in all his prosperity long before that. Still she was not alarmed; but on the 8th of September she received from the post office in Chicago a letter in a feigned handwriting, with a feigned signature, but still exhibiting such marked traces of the genuine handwriting of the deceased as to leave little doubt, upon investigation, that he was the author of it, inviting her to meet him at a house, No. 94 Quincy street, Chicago, at the same time declaring that he was an entire stranger to her, and professing the warmest friendship for her. She exhibited that letter to her friends, the Misses Devlin, and they were of opinion that it was written by the deceased. Up to that time, if the suspicion had crossed the mind of the accused, she would have rejected it, and did then reject it with indignation, because no passage in the life of the deceased and herself had ever led her to suppose that he could be guilty of such an offense as that letter implied. They made inquiries immediately as to the character of the house, and found it was an assignation house of the worst character in town. Miss Louisa Devlin of her own accord said she would reply to the letter, and did write the answer, signed the name of Miss Harris, and deposited it in the post office herself. On the 14th of September a reply was received. In the meantime Miss Devlin had gone to the post office and requested the delivery clerk to note particularly who should call for the letter with that address, J. B. Greenwood, telling him it was a matter of some interest, and she asked him particularly to observe his hand, to see if there was anything remarkable as to that. On the 14th of September, as I have stated, they received a reply dated the 12th of September. Both of these letters will be given in evidence to you. Miss Devlin went to the post office and inquired whether the letter she had written had been taken out, and on his replying that it had, asked the clerk to describe the man to her. Having received a description she returned to the store, took the accused to the post office with her, and there let her hear the clerk's description. The clerk gave the description minutely and accurately; and being asked if he observed any peculiarity about the hand, said "Yes; he wore a set ring,

dark, but part light colored, on the little finger of his left hand." Miss Harris immediately exclaimed, "That is the very ring I gave him." In the testimony of one of the ladies from Burlington, you will find a minute description of that ring, and the fact sworn to that it was given by the accused to the deceased long before as a pledge of her love. Still, not satisfied with the description of the person and of the ring, they exhibited to him a full-length photograph of the deceased in the military uniform of a captain, which will also be exhibited to you. The clerk immediately, exclaimed "That is the same person, except that the man who called for the letter was dressed in citizen's clothes, and his whiskers and beard were not quite so large as they appear to be in the picture."

Still, not satisfied with all this accumulative proof, Miss Jane Devlin and the accused went in open day to the house 94 Quincy street, and there called for the woman who kept it. They stood in the vestibule, without entering the house. She met them there, and entered into conversation with them. They asked her to describe the man who had made that appointment. She said "He was here on such a day, (naming it,) and told me when the bell was pulled not to answer it, for he would sit at the window by the side of the door, where he could see the lady come up the steps, and he himself would answer the bell and, when she saw him, she would answer without hesitation; but, if she saw any third person there, she might be repelled without entering; she knew him so long a time and well, that she would enter without hesitation. She stated he was there when they were coming, but, seeing two of them coming together, he had made his escape by a back way." They asked her to describe him, and she did so with such minute accuracy as to overcome the accused, and put her in such a state of excitement, that Miss Devlin dared not take her back through the open street through which they came, but by a back way got her to the store. The next day the keeper of that house called at the store, and they exhibited to her the photograph of the deceased, in military dress. She immediately exclaimed, "That is the very man, except that he did not have on military clothes." Thus convinced, and overwhelmed with the discovery, Miss Louisa Devlin went out to see the brother of the deceased, to know whether his brother was in town or not. She saw him, and he assured her that he was not in town at that time, but had been a few days before. The next day, the accused, taking with her all the mementoes of the affection which had so long existed between herself and the deceased—the letters, photograph, &c,—went with them to this brother, a reverend clergyman, presiding over a college close to Chicago, and carrying with her these two letters, containing these infamous propositions, inquired if his brother was in town. He told her he was not; yet she says she saw him as she was going out to that reverend gentleman's, coming into town in one of the horse-cars, passing her on the road. That denial shocked and startled her. She was

sure it was not true; for she had seen him, as she believed, rise up in the car, as they met and passed each other, and look out of the window to see her. She could not be mistaken. She shewed him these last two letters, and he denied that they were in his brother's handwriting. He had denied that the brother was there; and he treated her with harshness and with severity. Fortunately for the truth and the cause of justice, she retained possession of all the articles she thus carried with her to surrender; and we have them here in court, and will exhibit them to you.

On the day that she had this interview with this reverend brother, and within an hour or two afterwards, he performed the marriage ceremony for the deceased with the lady who now survives him, and who has been overwhelmed in the distress caused, not by us, but by those who produced the causes which have led to this unhappy result. A few days after this, she saw the notice of the marriage of the deceased in one of the public papers of Chicago, and immediately afterwards was seized with an attack of physical disease with which she had never before been disturbed, and which, at regular periodical intervals, has continued to visit her to this day. From that time forth her character and her physical condition were all changed. The light of her existence had gone out. She became moody, melancholy, depressed, and exceedingly quiet; and yet, during the intervals of these attacks, she went about her business mechanically, and to all external appearance, except to those who saw her intimately, and except so far as the loss of flesh was concerned, she continued the same.

She was then visited by one of the most skilful physicians of Chicago, who treated her solely for the physical disease; he having had no intimation of the moral causes which aggravated and produced it. On a recurrence of one of these attacks in midwinter, in intensely-cold weather, she got up in the night, with nothing on but her night-clothes, went into an adjoining chamber, and lay upon the floor. She resisted all remonstrances, and persisted in lying there: and this she repeated at different times during that winter, in the inclement climate of Chicago. On one other occasion, Miss Devlin, with whom she slept, found her stealthily getting out of the bed, and dressing herself, in the early gray of the morning. She laid still, pretending to be asleep. At that time, under the prescription of her physician, the accused was required to lie in bed until after she had had her breakfast. Miss Devlin waited until the accused was fully dressed, who then approached her bedside, and leaning over her, supposing her to be asleep, said, in a low, gentle tone, "I would kiss you, but I must leave you." Miss Devlin then threw her arms around her neck, and restrained her forcibly with great difficulty. After a while, by gently persuading her, she got her to undress and to return to bed. She then asked her where she was going so early in the morning, for it was not yet day. She said she was going to take a walk on the lake shore.

On another occasion, during one of these attacks of disease, she was sitting at the table with the two Misses Devlin at dinner, in the afternoon, when she exhibited to Miss Jane Devlin some letters, or a letter, and asked her if she did not wish to read a very fine letter. Miss Devlin, who knew the history of the accused, and was familiar with the handwriting of the deceased, looking at the letter, and seeing it was in his handwriting, said, in substance: "No, I do not want to read letters from any such contemptible fellow, and I hope I will never hear the name of Burroughs mentioned again." Thereupon the accused instantly sprang up, seized a carving-knife, and attacked Miss Devlin, who made her escape with difficulty out of the room, the accused pursuing her with the carving-knife to the door, and attempting to wound her. The other Miss Devlin then seized her, and with great difficulty, although she was a much stronger and larger woman, succeeded in wresting from her the carving-knife. Immediately afterwards, on Jane Devlin's return, she said she would not stay in the house, but would go into the street, and go somewhere else. The door being locked, she attempted to leap out of the window. After a while Miss Devlin, thinking that that would soothe her quicker than in any other way, said she would let her go; but she must go out of the door, not out of the window. The door was then opened, and the accused walked out. It was now late in the afternoon, and the sun was nearly down. Miss Devlin told her sister to follow her without letting her see her, and observe where she went, and what she did. Miss Jane Devlin did so. She saw her first stop a street-car, go up to it as if to get in, and then turn from it and walk down the street, and enter the Tremont House, the principal hotel in Chicago. She then returned to Chicago, and obtained the assistance of a Mr. Harris, who, while he was no relation to the accused, was, with his wife, a warm personal friend, having known her in Burlington. They then went to the Tremont House, but were unsuccessful in their efforts to induce her to return. After a while they returned to the house, leaving Mr. Harris with her to watch her. As night approached, she came back alone, quiet, composed, and "clothed in her right mind."

In the month of July, 1864, the Misses Devlin removed from Chicago to Janesville, Wisconsin. The accused went with them. They there opened a store and she assisted them.

On one occasion, either at Janesville or Chicago, (and this was the only occasion on which she ever exhibited any violence to any person not of the family of the Devlins, which has come to our knowledge), while they were all three engaged in the conversation with a lady customer in the store, she seized a large pin cushion, with a piece of brick in it to keep it steady, and struck this customer without any provocation at all. Repeatedly on other occasions she attacked Jane Devlin violently. Miss Jane Devlin and the accused being nearer of an age, in an early stage of their acquaintance were thrown into more familiar intercourse

with each other, and soon became warmly attached friends, and have ever remained so.

Thus, some months would pass without any extraordinary excitement. In July, 1864, before they left Chicago, the accused had employed counsel to bring suit against the deceased for breach of promise of marriage. The testimony of that counsel will be read in the cause, and you will see the condition of her mind at that time, the object of her instituting that suit, and the skill with which the deceased evaded an arrest to respond to that suit, while in Chicago on a visit of three weeks or more. The writ was placed in the hands of an astute detective officer, and yet he failed to serve it. After that she endeavored to persuade her lawyer to accompany her to Washington for the purpose of having the suit brought here. He dissuaded her from this course, and refused to come; yet, when she found it was impossible to serve the writ in Chicago, she, alone, unbefriended, the little, quiet, frail being you see before you, prevailed upon Miss Devlin to furnish her with money to come to Washington, that she might sue him here; and the Misses Devlin believing that that would bring more quiet to her mind than anything else, as it would lead to a thorough exposition of his conduct, and purify her character from every shadow of doubt or suspicion which might be cast upon it by the circumstances of his desertion, these being the things which were preying upon her mind, furnished her with the means to come. She visited Washington, and on her arrival here found that he had gone, as she understood it, back to Chicago on that same day. She took the return train without stopping, and went back to Chicago.

Time passed on without anything remarkable occurring until the latter part December, 1864, when, in one of her periodical attacks of physical disease, while a sister of the Misses Devlin (who was then on a visit to them,) was exhibiting a most elegant and costly piece of silk patchwork or bedspread, the accused, without any ostensible cause for it, seized upon and attempted to cut, hack, and destroy it; and when with difficulty she was restrained, and locked up in a room, she attempted to force the door and to deface and spoil the Misses Devlins' carpet. After this, the Misses Devlin believing that there was no remedy except the institution of a suit against the deceased, again consented to furnish her with the means to visit Washington for that purpose.

Long before that, and almost a year ago, she had purchased a toy pistol—a Sharpe's four-barreled revolver—which lay in her open trunk, and which Miss Devlin saw; and when she remonstrated with her to know why she spent her money so foolishly, she answered that many ladies went armed, and she was afraid every day that Dr. Burroughs and his brother would snatch her up on the street and carry her off to some place where she would never be heard of again, and she had bought it for her defense. On the first occasion of her leaving Janesville to come to Washington, which was about the 1st of January, she put into her trunk

a pile of the letters she had received from the deceased, and, with them, threw into the trunk that pistol, which will be exhibited to you, and which, you will see, has never been used. When and under what circumstances she loaded it, or it was loaded, does not appear in the progress of the case.

She reached Baltimore, consigned to the parents of the Misses Devlin in that city. She was there taken sick, and remained three weeks, when she was visited with this periodical attack of physical disease. Recovering from that, she made an arrangement with the lady at whose house she was staying, to purchase for her a return ticket to Washington, for the 30th of January. A lady who occupied the chamber with her will state to you the facts and circumstances, exhibiting the condition of the accused at that time. You will find that on Saturday she communicated to this lady the whole history of her life, read to her the letters which she had received from the deceased, and commented upon them; and she read until past two o'clock on Saturday night, when this lady fell asleep, leaving her still awake reading and commenting upon those letters. The next day, (Sunday,) she told her story to the lady of the house where she lived; told her that she was coming here; told her of her love for the deceased, and of the agony she had suffered, without uttering one word of reproach against him. She believed her character had been stained, and she was coming here to vindicate in our courts that character. She said he was poor and she did not seek compensation in damages. All she desired was to have her character vindicated. That lady procured for her a return ticket, and agreed to go down to the cars with her and see her off.

Sunday night was passed as was Saturday night, in reading and arranging these letters to be submitted to counsel in Washington. She had a card with the name on it of some professional gentleman she was to visit here. Her companion again went to sleep, leaving her sitting up engaged in thus arranging the letters. They had agreed to pass that Monday evening in attending a lecture of Henry Ward Beecher in Baltimore, and her companion cautioned her not to take a train on her return later than four o'clock, or she would not be on in time. When she awoke she found the accused was still at work, preparing to come to Washington with a pile of letters tied up, and the pistol lying on the bureau. She left her thus engaged. Shortly afterwards, for it was then late, the lady at whose house she was stopping, called to her from the foot of the stairs, and told her to make haste, or she would be too late; and in her hurry she threw her bundle of letters into the trunk, put the pistol in her pocket, and thus started for Washington. Arriving here she went to the Treasury Department, and opening the door of the room, saw the deceased sitting at his table. She did not stealthily open the door and peep in, but opened it wide enough to present her whole form to view to any one in the room who might be looking in that direction; and stood there long enough to have a lady who was

employed in the room see her, and be able to recognize her as the same lady she had seen there last fall, and who was about to invite her in when she closed the door and walked away. Her appearance struck the lady at the time—especially the character and expression of the eye. An hour subsequent to this, while standing in the hall, the deceased passed by her, and under an impulse which she could not resist, she drew her pistol and fired. He turned, looked at her, and exclaimed, "Oh, my God," and fled. Just before he fell, as he turned the angle of the hall to pass down stairs, she fired a second time. She then calmly walked down the steps without anybody molesting her, and walked, as she supposed, out of the door of the building she had entered. She was then arrested and carried back. She was calm, moving, as it were, mechanically, without shedding a tear. She was taken into a room, and immediately afterwards Mr. Handy, a justice of the peace, came in. On his telling her that he was a justice of the peace, she immediately surrendered the pistol. She then for the first time began to yield to the paroxysm of despair, which continued for days afterwards. She tore her hair, threw herself upon the floor, and on her knees, and was raised repeatedly by Mr. Handy, or Mr. McCullough, or both. To both she exclaimed, when they asked why she did it, "Why did I do it? Oh God, how I loved him! I loved him better than life itself." A policeman was present during all this time, and in the course of that interview Mr. McCullough asked her—"If he had wronged her in any other way than by desertion." She said "No," and immediately relapsed into this terrible state of excitement. Upon Mr. McCullough again fixing her attention and asking her if she was a virtuous woman, she exclaimed, "As God is my judge, I am pure," and instantly again relapsed into a frenzied state of excitement. It is said that on the way to the jail, she communicated to the officer having her in charge, a story diametrically opposed to the one she had told Mr. McCullough; and upon that, we understand, the prosecution will rely. I was applied to shortly afterwards by her friends, to undertake her defense, and I positively declined. Two or three days elapsed, and for reasons which were satisfactory to my own mind, finding that it was necessary that some known and responsible man should take charge of her case, I visited her, and took charge of it to the extent and to the extent only that I would see that she was properly defended. I had then no suspicion of the dreadful malady with which she was afflicted. Late in the month of February, Mr. Phelps, of Burlington, a lawyer of eminence and distinction, and well-known in the profession, was here to attend to a case in the Supreme Court, and his wife was with him. I saw them in her cell. I went with Mr. Phelps, was introduced to his wife, and I know that during the week that they were here, instead of mixing in the gaities of the season, which was just preceding the inauguration, she passed the greater part of her time with this disheartened and afflicted woman in her cell. That

fixed my attention. Still, as I had not known her, nothing passed which led me to suppose that she was laboring under any species of insanity. A month elapsed, and in the latter part of March, I saw her again under such circumstances as raised a strong impression on my mind that she was at that time suffering under some mental disease. I found her hand cold, and her pulse over 110. She persisted in sitting in a draft of air so cold that I could not endure it, although well wrapped up. She spoke to me of a meeting of biologists, in which the spirit of the deceased had been evoked, and of which some one had sent her an account, and asked me if I believed in it as a science, or had faith in it, all of which was in such a manner as strongly to attract my attention. From that time forth I began to examine her case more as a physiologist and a lawyer, than from any interest I took in it. Twenty years ago my attention was strongly drawn to the subject of moral insanity, "paroxysmal" insanity, and from that time, as occasion has afforded, my attention has been directed to the inquiry into "paroxysmal insanity from moral causes." This was the first opportunity offered me of studying that subject under my own observation. Shortly after that, she had an attack of erysipelas in the head, with the treatment for which I had become familiar. I observed, and carefully noted the progress of that disease; had opportunities of administering to her such relief as would be afforded by medical men, and then for the first time had her confidence. From that time forth I have carefully noted the exhibitions of these paroxysms, and her condition during the intervals. On the 25th of April, a variety of incidents occurred which I shall state in my testimony, for I shall be examined as a witness in this case; and then, after the court shall have laid down the principles of law applicable to this case, my connection with it is over. I have no hesitation in saying from my own observation and experience, that during that period of time, from the 25th of April to the 20th of June, which was the last day of my observations, there have been three occasions in which she was undoubtedly insane. She was insane from moral causes, aggravated by disease of the body. This is our defense. A pure, virtuous, chaste, delicate little girl, not more than twenty years of age at this time, whose frame is wasting and whose spirits are gone, whose heart is broken, in a paroxysm of insanity has slain the man who has brought upon her all this suffering. That is our defense, and we will expect to show this by the facts in the case, and the opinion of medical witnesses of the highest character. During her confinement, Dr. Nichols has visited her. He will be present in court, and hear all the testimony in the case. The physician who attended her in Chicago will be here and examined as a witness, and from the testimony of these gentlemen, and the facts of this case, I have no doubt you will have the satisfaction of leaving that box with the conviction in your minds that the prisoner at the bar is not guilty of any crime towards God or man, although she has been the instrument of taking the life of another.

THE WITNESSES FOR THE PROSECUTION.

Dr. John C. Eiley: Am a physician. In the evening of 30th January was summoned by the coroner to the Treasury Department. Found a dead body which I was told was Mr. A. J. Burroughs. A wound about two inches to the left of the spine, between the fourth and fifth ribs, just immediately above the fifth rib had evidently been made by a bullet. Cannot tell exactly how long he had been dead; the body was cold when I examined it. A wound of that kind was sufficient to cause death.

Coroner Woodward: Am coroner of the county. (He testified to same effect.)

Alfred Everett: Am a clerk in the Treasury Department. A. J. Burroughs occupied the very next desk to me. We left our room at ten after four o'clock on the 30th January, Mr. Burroughs by one door and I by the other. I overtook him in the hall. As we were passing the clock I was in the act of laying hold of his arm. The recess formed by the end of the case and the slight recess of the door would form a hiding place for a person. We were just passing the door when the first pistol shot was fired. Whether the person firing the shot was secreted behind the door, being in wait there, or whether she came that moment from the opposite direction, I could not say. The person who fired the pistol was apparently

in the door-way, and fired between us—across us. Burroughs, as I have said, started forward, making a bound, as it were, and I started hastily backward; but it was nothing more than just a sudden rebound, for we were startled. He turned round instantly, threw up his hands, and exclaimed, "Oh!" and ran in a direction from the person who fired the pistol, whose back was then towards me. I stood still, as if transfixed. This person who had fired the pistol immediately stepped out into the center of the hall, deliberately took aim at Burroughs, as he was running, and fired a second shot. Simultaneously with that he fell. She then turned, and walked deliberately past me. Scarcely a second elapsed between the firing of the first and second shot—just the time required to bring one into position to fire a second time. He ran as a man running for his life after the first shot, had passed the fourth door, and was in the act of turning round the end of the hall when the second shot was fired. She turned and passed me and went down the stairs. Met Dr. Herbert on the stairs and requested him to follow her, telling him what had transpired. Then ran to Mr. McCullough's room to tell him and to get assistance. I observed her face but it would be impossible for me to swear to the identity of the person.

(The prisoner being requested to raise her veil, *Mr. Bradley:* We do not dispute the fact that this is the party.)

She appeared to me to be perfectly cool and self-possessed. She walked deliberately and coolly down the hall and down the stairs; her face was perfectly colorless and pale and her features appeared to me to be set. She wore her hair in curls.

Charles A. Sengstack: Was watchman in the Treasury Department. Remember arresting a lady on the front portico of the Treasury on the day of the shooting of A. J. Burroughs; she was just in the act of stepping off the steps. We walked into the hall again; I pointed to a chair and asked her if she would take a seat. She asked me if I could not put her in the room. Went to the door of the watchroom but found it locked. She had her veil down. Discovered no evidence of emotion or excitement while she stopped at the door. She said, "For God's sake get me into the room" or, "Get me in as quick as you can." Told her I was doing all I could. As soon as the key was brought I unlocked the door, put her in the room and sent for Squire Handy. The body of Mr. Burroughs was then lying about fifteen feet from her—having just been brought down.

Cross-examined: When this body was brought down she had her veil down. She seemed to labor under a great deal of excitement — was throwing up her hands and going on in a tragical manner and saying something, but what it was I could not tell.

William Schelley: Was door-keeper of the main entrance of the Treasury Department in January. Saw there Miss Harris on

the 30th. She came there about a quarter past three o'clock. She said that she would like to come in, that she wanted to wait for a gentleman friend and a lady friend also. Told her that it was my positive orders to let no one in after three o'clock; but she being a stranger I would take her in and give her a chair. I did so but she did not remain there very long.

Samuel Stearns: Was a door-keeper at the Treasury building in January last. The day A. J. Burroughs was shot a lady came there between two and three o'clock. I think I have seen this lady (the prisoner) before, but cannot say as this is the one who inquired for Mr. Burroughs, because there are so many coming in there that I do not take any particular notice of them. She inquired in a very lady-like manner if there was a gentleman employed in the Department by the name of Burroughs. Told her would refer to my directory. I opened my book and there were two Burroughs. She pointed out A. J. Burroughs, asked me what bureau he was in and I told her in that of the Comptroller of Currency. She asked if she could not wait at the door until he came out. I told her yes, but there were four entrances and it was not very often he came out that way. She then asked me to direct her to the office of the Comptroller of the Currency. Went as far as the door with her, and told her to go upstairs; that there were plenty of messengers there to show her in which room he was. I offered then to go up

with her; she thanked me, said she guessed she could find it. That is the last I saw of the lady.

Edwin G. Handy: Had charge of the watchmen of the Treasury Department January 30. A few minutes after four I was sent for, being told that there was someone murdered in the building. Found Miss Harris in the room and Mr. Sengstack at the door, holding it. I received from her this pistol. It was loaded; two shots had been fired and two had not. She was at the time throwing her arms about, walking backward and forward, pulling her hair, getting down on her knees to me and so on. When she handed me the pistol I asked her what she did it for, or, "what she shot the man for." I didn't know at that time who was shot. She replied, "Why did I do it? I would give my life to save him" and all such expressions as those. Then she asked me if the man was dead. She was on her knees or moving about the room in an excited manner. I had to lift her from her knees several times.

July 8.

George H. Walker: Am of the metropolitan police. On 30th January last was called to the Treasury Department. Mr. Handy met me and took me to a small room; he requested me to take a lady in custody. There was no one in the room but himself and Mr. McCullough. I started with the prisoner for the jail. Have never seen the prisoner since till I saw her here. The lady was traversing the room to and fro. She looked

wild, had her hands in her hair and seemed in great agony. She asked me where I intended to take her. Told her I would have to take her to jail. A hack was ordered by Mr. McCullough who took her to it. Asked her if she had no friends in Washington. The answer was, "None at all." Asked her if she had ever been in Washington before; she said only once, last summer. Not seeing Mr. Burroughs she left the same day. There was nothing more said. As we turned the corner of F street she remarked, "I will tell you all about it." Told her I didn't wish to hear anything about it.

At the room she asked me to telegraph to a lady in Wisconsin, Louisa A. Devlin, Janesville, Wisconsin. The words I sent were these: "I have arrived in Washington and shot Burroughs. Come on immediately." ..

As we left F street she said she didn't ask sympathy of the people for herself, it was in regard to her family; that this man had ruined her; had caused her to be driven from her home and her friends; had seduced her and taken her to a bad house in Chicago. And that she told him that if he didn't comply with his promises she would have revenge on him at the risk of her life. That she had procured a pistol in Chicago and had come on here with that determination; that she had arrived here that morning and had accomplished her object. She seemed in great distress and very weak. We had to support her into the jail. As I was about to leave she re-

questioned me to send the telegraph.

Hugh McCullough:¹⁰. Saw Miss Harris in one of the rooms of the Treasury building upon the floor where the body of Mr. Burroughs was lying. Her conversation was chiefly in exclamations. I put but few questions to her. I listened to her rather than carried on the conversation. The first question she put to me was, "Is he dead?" At that time Mr. Burroughs was still breathing. I went out and returned to her soon with the information that he was dead.

Miss Harris was much excited and uttered such exclamations as—"Why did I do it? Why did I do it?" She said she had known him for many years; had been engaged to him. Asked her if Mr. Burroughs had done her any other injury than the violation of her engagement. She exclaimed with a great deal of emphasis that he had not.

I put the question to her, "Are you a virtuous girl?" "Yes, as God is my witness," was her answer. That is about the amount of the conversation that took place.

¹⁰ McCULLOUGH, HUGH (1808-1895). Born Kennebunk, Me. President State Bank of Indiana, 1857. Secretary U. S. Treasury, 1865-1869, 1884. Died in Washington.

Cross-examined: I had never heard of or known her before. Mr. Burroughs came to my bureau—I was then Comptroller of the Currency—in the Spring of 1863 and secured a clerkship. Had no particular personal social relations with him; my relations with him were not more intimate than with the balance of the clerks. Miss Harris, while making the ejaculations I have referred to, was deeply excited and seemed to be in despair—in a frenzy. I think as I came in she dropped on her knees. She put her hands upon my coat with great energy as she asked the question regarding Mr. Burroughs. I don't think she shed any tears. I don't think she was flushed, but pale, or rather, pallid. Did not take notice of her eye, but her whole manner was striking and impressive in the extreme. Recollect I fixed her attention for a moment, and put questions to

her; she answered as if she comprehended them—answering clearly and coherently—but immediately after giving the answer she would return to exclamations, pacing the room, and exhibited every indication of being perfectly overwhelmed. She was much moved, ejaculating, "Why did I do it?—oh, how I loved him; why did I do it?" and such like. I never witnessed an instance of greater excitement from moral or mental affection of the mind. Next morning, I took Mrs. McCullough to the jail with me, and with Mr. Beale, the warden, went to her cell to see if she needed any aid. Mrs. McCullough felt interested in her. We found a gentleman from her own State had taken charge of her wants. I found Miss Harris much in the same condition in which she was at the interview of the afternoon before. She was pacing the room as upon

that occasion, and her exclamations were much of the same character.

Mrs. Woodbridge: Am employed in the Treasury Department. Was acquainted with deceased. My desk was adjoining his. Prisoner, on the afternoon of 30th January, came to our room, opened the door and

looked in, and then left while I was thinking whether I had not better get up and speak to her. Burroughs at that time was sitting down writing at his desk.

Cross-examined: Was struck with the idea that she was much excited. She appeared as if she wanted some one.

THE WITNESSES FOR THE DEFENSE.

William W. Danenhower: Am employed in the Fourth Auditor's office of the Treasury. Knew the deceased; he acted as assistant to me for five months—during 1863—in conducting the correspondence of the Auditor's office; I was at that time chief clerk. Every day he wrote

letters under my control. Have today examined this pile of letters (referring to the package of letters addressed by Mr. Burroughs to the prisoner) and with the exception of one which purports to have been written with his left hand, recognize them as his handwriting.

Mr. Bradley proposed to read some of the letters and offer them in evidence, to show the relation in which the parties stood to each other and the effect it had on the mind of the prisoner, causing insanity when the relations were severed.

Mr. Carrington objected. The letters were not admissible as evidence to show insanity on the part of the accused. The defense proposed to show the insanity of the prisoner first by showing an engagement between her and the deceased.

Mr. Hughes: We propose to offer in evidence this bundle, containing some ninety-two letters, extending from November, 1858, to August, 1863, part of an unbroken series of correspondence, establishing the relations of betrothal. These show upon their face that the deceased first became interested in this young lady when she was about ten years old; took charge of her, as it were; he being a man of some thirty-two years, a merchant in the city, and she quite a little girl; that he trained her up with the understanding that as soon as she was sufficiently advanced in years he would make her his wife. We expect to show that he was married to another person, and that the announcement of his marriage was the first notice that she had of any disposition on his part to terminate these relations, excepting certain anonymous letters, which are part of the documentary evidence we propose to offer, and which we expect to prove to have proceeded from him, proposing to her to meet him at a house of assignation, for what purpose is to be a matter of inference, or of argument. We offer these letters expecting to establish the connecting evidences, and

with a view to show that the result of this injury, shock, or disappointment, shame and mortification, upon the mind of this young lady, was such as to unsettle her reason upon all subjects connected with the deceased, and that such was her state of mind at the time of the homicide for which she is now held to answer.

THE COURT: This evidence is offered, not for the purpose of proving the insanity of the prisoner, but for the purpose of showing that some causes existed years ago which might lead to a certain result.

Mr. Voorhees: We propose to commence years ago, and to bring it down to within three days of the time that he left her, and married this other woman. We propose to show that on the subject of Burroughs she never was what she had been before she became temporarily deranged.

THE COURT: If the plea of insanity were not in this case at all, or the defense of insanity had not been set up, it is apparent that this evidence would at once be excluded by the Court. It would in that event scarcely have been offered by the counsel for the prisoner, because provocation, however great, arising from the use of language, or letters written so long anterior to the occurrence of the murder, is not competent evidence to show the provocation under which the party acted in committing the deed, but such defense having been set up here it is a perfect defense in itself, with or without cause, if made out to the satisfaction of the jury.

The Court, therefore, thinks that you ought to be confined in your evidence to any occurrences, any acts on the part of the prisoner, showing insanity or want of accountability in regard to questions connected with the deceased, who was afterwards slain by her. If she had never been engaged to be married to him, if she had never before known him, but accidentally seeing or hearing of this marriage, to the lady whom he afterwards did marry, she became insane or frenzied, under a delusion from that subject, and afterwards slew him, the insanity would be a sufficient defense. This being the case, the Court holds that whether this insanity, which is to be made the defense in this case, be with or without cause, it is a defense, and to go back to the past history of the lives of these two parties, and read in evidence the letters from one to the other would not be proper.

Mr. Bradley said there was one view of the case which had not yet been suggested and which they did not at present desire to refer to, under which he thought the letters would be admissible. It was sufficient for the present to say if we shall give proof of insanity it may become a question whether it was real or feigned and then evidence of the cause will clearly be admissible to show it was real.

THE COURT: If upon further reflection or a change of the aspect of the case in the future progress of the trial, the Court should be of opinion that this evidence should be admitted, it would be.

Mr. Carrington: We are prepared to prove that deceased had

never wronged this woman; that he died without a stain upon his character.

Mr. Bradley: I won't take any man's word for that, when I have the evidence of the man's guilt in his own handwriting.

Charles L. Phelps: Am a lawyer of Burlington, Iowa; had known accused from the time she was eight or ten years of age. She was of slender frame, of good temper, of a happy and active turn; had a brilliant eye, but was nervous. Though unschooled, she was naturally intelligent. Saw her in jail, in Washington, in February, several times. Her eye wore a wild look; she was incoherent, and in relating anything she would in a few minutes contradict herself; was haggard in her appearance; would not have known her by her voice. Knew Burroughs in Burlington, Iowa. Saw him with accused frequently.

Mrs. Eunice Phelps: Knew Mary Harris from 1862 or '63, when she moved to Chicago. Saw her in jail in this city; so changed that I would not have known her. Frequently saw Burroughs with her in Iowa. He called at the house often. Mary read her letters at her house. Her friends were strongly attached to her. Her sole motive and desire in life was to please Burroughs. He controlled her in all respects.

Mrs. Mary Jane Winters: Knew accused about ten years. She was at her house nearly every day; came to her for advice in all matters; was quite reserved, except in company of friends; she never desired to increase her acquaintance; suppose it was because she was engaged from youth to Bur-

roughs; she seemed to have no other motive or aim in life than to please Burroughs, and to fulfil her engagement with him. Burroughs visited my house in May, 1861; he apologized for coming by saying that he and Mary were engaged to be married, and he dared not go to the house of her parents to see her, as they were opposed to him. Shortly after this, Mary went to Chicago and clerked in a store. Burroughs afterward took her back to Burlington, when he informed me they would be married in three weeks, and that he did not wish the woman he was to marry to act as clerk any longer in Chicago. Said he was trying to raise a company of men for the war; if he did not succeed in that, he would marry Mary and they would go to California. He had a ring on his finger, and, when asked to remove it, said he could not, as it had been put on with a wish. Some time afterward, Mary received a letter from him, in which he stated that he could not then get married, as he had a leg broken. Burroughs was master of Mary's heart and affections.

Mrs. Louisa Hall: Mary Harris was a frequent visitor at my house. When quite young she went into the store of Mrs. Alexander, in Burlington. She went regularly to church. Her temper was good, but have seen her vexed; never saw her exhibit a violent temper. In the

spring of 1863 she went to Chicago. A short time before Miss Harris left for Chicago, Mr. Burroughs called to see her. Knew nothing of the relations between them but what Miss

Harris told me. Miss Harris was very reserved, and generally associated with married ladies. Mr. Burroughs had complete control of her affections, and swayed her as he wished.

Mr. Bradley offered in evidence the letter referred to in *Mrs. Winters's* testimony.

Mr. Wilson objected. He said the paper was a mere mutilated part of a letter, and it showed no connection with the prisoner. It was but a half-sheet, had no signature, and was simply headed "Dear Little Mollie."

Mr. Bradley said it had been shown that the letter was in Burroughs' handwriting, and it was in the possession of the accused.

The letter was admitted as evidence. Dated Chicago, August 18, 1862, and headed "Dear little Mollie." It acknowledges the receipt of a letter, and the writer says he raised a company for the three-months' service, but declined to take command of it, and raised another company for the three-years' service. Before starting, however, he broke his leg, and consequently he was obliged to abandon the project of entering the army.

Mrs. Eliza J. Harris: Reside in Chicago; knew accused and Burroughs in Burlington. He called frequently at my house in Chicago and spent nearly every evening there with Mary Harris and often stayed very late. She always understood they were engaged because they acted in all respects as lovers and in all his letters he called her his darling Mollie and his only Mollie. Noticed a change in the defendant about the time of Mr. Burroughs' marriage. She came to my room two or three times a day and told all her troubles. She expressed the belief that Burroughs had all along been false to her and said he wanted to take her to an assignation house and offered to read to me the letter he had written her. When referring to the subject of the proposed meeting at the assignation house Mary would become much

excited and would walk to and fro about the room. Advised her not to take it so much to heart. Her troubles seemed to prey upon her mind and she brooded over them day and night. Noticed a change in her health and she grew thin and poor. Her troubles seemed to be wearing her out.

Lewis H. Davis: Am an attorney in Chicago. June 5, 1864, Marry Harris employed me to commence suit against Burroughs for breach of promise of marriage. Commenced the suit on 5th July, 1864, and filed an affidavit for *capias*. The writ was never served. Understood the motive that prompted Miss Harris was to vindicate her character and honor, she being impressed with the idea that the course of Burroughs had cast disgrace and dishonor upon her in the estimation of her friends. Showed me a let-

ter written by Burroughs when he invited her to an assignation house; and after she became satisfied that Burroughs had written the letter her love for him appeared to turn to hate. I requested permission to see Burroughs' friends to settle the matter. Accused would not permit the conference with Burroughs' friends. She said she did not wish any money, but simply to vindicate her charac-

ter. She asked me once to accompany her to Washington to institute proceedings against Burroughs. Whenever the question of the house of ill-fame was brought up she spoke of the matter in a tone of virtuous indignation. Was convinced that her feelings were such towards Burroughs that it would not be safe for her to meet him alone.

Mr. Bradley offered to read the letters. The COURT decided they were now proper testimony. *Mr. Fendall* therefore read extracts from the following letters which were not signed by deceased, but which were proven to be in his handwriting:

Ottumwa, November 1, 1858, signed "Incog." It commences: "Dear little Mollie"—an ordinary letter from a grown man to a little girl. He advises her not to show the letter to Mrs. Alexander, by whom she was employed, for she might injure him. He says he proposes to keep trace of her through the medium of the post office, and that she must not think it strange if he manifests that fatherly care he has assumed. She may not thank him for the assumption, but still he will exercise it. He says he would like to talk with her, and uses most endearing terms.

Ottumwa, November 9, 1858, headed "Dear Mollie," and also signed "Incog." The writer acknowledges the receipt of a letter from Mary Harris. Advises her to be careful, and treat her employer with proper consideration. Says she may rely upon his friendship and confidence. Says he will not flatter her, but tells her she has more than common qualifications.

February 27, 1859, addressed "Dear Mollie," and ending "Yours, affectionately," but with no signature. From this it appears that Miss Harris had written to him, and addressed him as her dearest friend. He asks, "And am I really so?" and says he wishes to be considered her dearest friend and her truest. Her regard for him, he says, is felt with true appreciation. Goes on to speak of a number of enemies he had had in Burlington, and says, despite the enemies, he wants soon to go there, see little Mollie, and get the kisses she promised him on his advent.

Eddyville, April 9, 1859, addressed "My dearest Mollie," and ending, "Most affectionately, yours, A. J. B." Acknowledges receipt of a letter, and a "sweet little forget-me-not" enclosed. Promises to grant her request and never forget her. Reminds her how he used to scold her, and excuses himself by reason of his affection for her, and says he is her senior and almost old enough to be her father, and says if he were near her he would give her some of the sweetest kisses and fondle her in his arms.

Des Moines, April 18, 1859, addressed to "Dear little Mollie." Says that the object that fills his mind is the fact that Mollie loves him in spite of all opposition, and he assures her, as his "dear girl," that he will not soon become unmindful of the fact. Closes with his most affectionate regard.

Eddyville, April 28, 1859, addressed "My dear Mollie," and unsigned, but concluding with the words, "Good-by, my little darling." Miss Harris is taken to task for writing what her correspondent calls a "suspicious letter." He advises her to remain with "Sue," (supposed to be Mrs. Alexander, with whom Miss Harris was employed.) He says, "for my sake, dear, dear Mollie, stop with her." He speaks of going to Pike's Peak, but says he wants some of her kisses before he goes.

Eddyville, May 11, 1859, addressed to "My dear little Mollie," and ending with the words, "Yours, affectionately," but no signature. Complains that Miss Harris does not write, but he hopes Mollie has affection for him yet. Hopes to let her yet hop on his knee, and to get some of her sweet kisses. Speaks of going to Pike's Peak, and says Mary's request, "don't go, dear," will be granted yet. Says he wants her to be happy and good, and refined in manner.

Eddyville, May 22, 1859, and addressed "Dear little Mollie." No signature, and ends with the words, "Good-by." "There is a warm place for you way down deep in my heart."

June 11, 1859. No place named and no signature. Addressed "My dear, dear Mollie." Advises her to be more careful of her health, and gives her a full history of his pecuniary matters and some pecuniary difficulties.

June 26, 1859. No place mentioned and no signature, but ending "Dearest girl, good-by." Is addressed to "Dear, dear Mollie." Intimates in this letter that she did not wish to be addressed as "little Mollie," for she now wore long dresses. But he says he cannot divest himself of the thought that she is still the "little Mollie" who sat upon his knee and twined her arms about his neck, or who sat beside him, and about whom he twined his arms and lifted her up, and could have carried the precious burden to Paris. Expressed the fear that she would feel too big to sit again upon his knee and kiss him.

June 30, 1859, (no place,) addressed "Dearest girl;" July 2, 1859, and addressed, "My dear little Mollie;" August 2, 1859, and addressed "My darling little Mollie;" August 14, and addressed "My dear, dear Mollie." In all of these letters the writer speaks to the prisoner in the most endearing terms; expresses his love for her, and gives her very good advice. Speaks of going to Pike's Peak, and also of his pecuniary matters. He invites her to meet him in a sort of surreptitious manner at Mount Pleasant.

MONDAY, August 22, 1859.

O! MY DEAR LITTLE ROSEBUD: Is it afther making me crazy that you are, or is for making me heart jump clear up into the throat

of me till I'm kilt intirely, that you're saking afther, that you sind all the way from Burlington such a picture as would make the howley Virgin Mary blush again? O, howley St. Peter! what am I to do? My head grows giddy, and divil a bit can I sa. My hands fly up above the head of me; me fingirs stick right out sidewise; me hair stands on eend; me eyes steck out so far ahead of me, I can only touch them wid me hand, and I go runnin up the strate an' back again like mad! O, howley Virgin Mary, intercede for me! for divil a bit of rason have I got left, an' I'm mad intirely. You know, darling, when a person is bitten by a venomous snake, his skin assumes the color of the snake. If an abominable snake has such an effect on a man, is it strange that when *bewitched* by the sweetest-looking *Irish girl* that ever lived, he should become an Irishman? Who wouldn't be anything to be the recipient of such a favor as was I on Saturday evening? How am I to thank you for such a favor? O, joyous surprise! Glad source of delirious joy!

Many times I had longed for your picture, and let my imagination dwell upon the receipt of it, but durst not ask you for it, for reasons I will give you if we ever *meet—not now*; but it is the more grateful, coming as a surprise of inexpressible delight. Really, Mollie, as I returned from the post office after receiving it, I felt so light I could with difficulty keep the ground; I could scarcely avoid flying. I wanted to button everybody I met, and show them what I had got; and it required all the sense of propriety I could command to keep myself from doing so.

O! that *beautiful* picture! beautiful! beautiful! beautiful! And my beautiful! beautiful Mollie! What can I now *say* for her? I cannot *say*—words fail me. Could I see her, I might, perhaps, express *faintly* what are my feelings, as reawakened by such visible testimony of her loveliness.

O, Mollie, Mollie! you have turned my dry, sterile, old bachelor's heart into a gushing fountain of glad emotion, and warm, genial affection; and Mollie—dear, darling Mollie—is the source and *end* of all. Would I had a hundred Pike's Peak fortunes to lay at her feet, and the affection of a hundred hearts to lavish upon her. If "*another Mollie*" were to contest the claim of my love, she would stand but a poor chance *now*, if *not before*. When you were remarking concerning the change (*improvement*) that had taken place in your personal appearance, were you trying to make me understand that you had added to your already redundant stock of beauty? I did not fully take the hint then; I understand now. Nature has surpassed herself in bestowing new charms when the measure was already full, running over, and Mollie herself is taken by surprise at her own new excellencies. I understand it all now, and a most effective way have you adopted to bring the *fact* to my comprehension, and as modest and winning as effective. Your beautiful picture! I have to look at it the last thing before I put out the light at bed-time, and the first thing in the morning, before even I put myself in a condition to have any one (*unless*

it were some one to whom I sustained a different relation than I ever yet sustained) to look at me, unless by accident, as occurred once in B., at my boarding-house, when, from my long white robe, I was mistaken for a *Catholic priest*. Had my back been turned, they (the women who saw me) would have taken me for one of their own number, unless they had carried their *scenting-box far in*, in which case I *presume* they would have discovered their mistake.

And many times during the day do I look again and again at this beautiful shadow of a *more beautiful substance*, and each time draws forth some fresh exclamation of swelling admiration.

Do not, my dear Mollie, let that accursed blotch on your neck be left to mar such a beautiful person as yours. You have neglected it already too long. Do so no more.

Perhaps, dear girl, you will think me extravagant and excessive at my expressions of delight at the receipt of your picture; perhaps I am fulsome, *nauseating* even. But remember the circumstances. A man would justly be thought a fool, who, going to the town pump, would clap his hands and dance with wild exclamations of delight at the sight of water; but on the desert, where water had not been seen for many long, weary days, he would be thought perfectly sound, and all would rejoice with him. Were I with you, enjoying the richer favor of your presence, though I would receive your picture as a precious treasure, yet I would not go quite crazy over it, but would seek to exhibit good common sense. As it is, away off in the wilderness, among Arabs, hideous to behold, and worse to mingle with, I am like the man in the desert at the sight of water. So, under the circumstances, I hope you will excuse me, dearest, *if I do plaster it on rather thick*. I would not resort to gross flattery of your personal appearance, though your charms were those of Venus, (*and I do not think them short of it*;) for I possess too much of sincere regard for your best interests to turn flatterer, and injure you with extravagant praise. I would rather tell you of your faults, and show forth my regard and appreciation of you by the unmistakable evidence of duty faithfully performed.

"Faithful are the wounds of a friend, but kisses of an enemy are deceitful."

If I speak warmly in your praise, it is but the free gushing forth of uncontrolled feelings, and you know by experience may ring the din of hated chiding in your ears, and make you wish—O! so much!—it might but cease. But when I chide you, Mollie, I would rather take you in my arms, and soften the harsh accents by the soothing caresses of true, kind, and warm affection; for I am not a tyrant nor a bear in disposition; neither would I be the fitful cat, that utters her fondness in tones of winning tenderness at one moment, and plants her claws to the quick into her darling pets the next. But I would be as I have professed, your true friend; in *advance* asking pardon for his many failings. Will you believe me, Mollie? and will you understand me, as I

make my imperfect efforts to express my sentiments; while I protest I could tell you a *dam* sight better if I could see you! And, my dear, dear Mollie, shall I not see you at Ottumwa the first of the month? Dear girl, I want to urge you to come, if at *all practicable*, and don't let small considerations prevent you, and come in such a way as not to be tied up to somebody else, so to prevent our being together *most* of the time, mind you.

I broke my promise, and did not write "Sunday," but it was not because I had not intended to; but because I could not get a minute to myself. To-day has been rather dull, and I have snatched the odd moments to write you this broken letter. Will you accept it, darling, as the honest though poor expression of the warm sentiments of my heart, while I thank you again and again for your beautiful picture. GOOD-BYE.

The following was written across the top of the letter:

"Miss H—— was up here to visit H—— about four weeks since, and H—— will go to B—— in about two weeks. If you see her, she will tell you all about me. I call at their house quite frequently. You know she married ——, who used to live in B——. Perhaps she will make you believe I have found another "Mollie" up here. There are one or two respectable girls here that I go with to pass away the dreary hours; but compared with my dear little *Rosebud*, they are—I'll not say what.

With a cartload of kisses, I bid you adieu. ——."

September 11, 1859, addressed to "My dear Mollie." Also April 25, 1860; and June 8, 1860, wherein the subject of going to Pike's Peak is still mentioned, and the most endearing terms are used.

June 18, 1860, the writer says he cannot but appreciate Miss Harris's enduring affection. The letter is not completed but, is continued August 1st, and apologizes for not finishing it. August 22d, he writes upon the same paper, and again makes apology, giving as a reason for apparent negligence his absence from town. Asks Mary Harris to forgive him, and calls her his "dear, noble-hearted girl," and promises to send her his picture.

July 11.

September 5, 1860, and addressed, "My dearest Mollie." Excuses himself for not writing before; says he is chagrined at his folly, and is sorry he has compelled his correspondent to suffer too much anxiety on his account. Regrets that some one has found out the engagement between them, and says he would rather the devil had got his nose in the matter than that Mrs. H. should have done so. Expresses anxiety as to her intention of changing her business, and expresses the hope she would go to school during the winter.

September 23, 1860, "My dear, dear Mollie." Speaks of a proposed meeting, and says the desire to write is not lessened by the prospect of an early meeting; of clasping her to his bosom, and of feasting himself with her presence. Says he has had evidence of the fullness of her affection.

October 5, 1860, and addressed, "Dearest little Mollie." Receipt of two letters acknowledged. Disappointment is expressed that a proposed meeting did not take place. Says an expected meeting must be postponed for three months longer. Expects, however, to meet her while on his way to Chicago, where he expects to spend the winter, after which he will go somewhere, and prepare for a different life. He says: "I am tired of a life of single blessedness, or rather single cussedness, and could live very happily with a pretty little black-eyed, curly-headed lady, whose name I will not mention." This letter was not finished until October 10, at which time the writer excuses himself by alleging continued confinement at business. Uses the most endearing expressions in this letter, and says that those who in religious faith worship another Mary do not do so more earnestly than he does the Mary he adores. Asks her why she can't come to him, and says if he had money they would not long be separated. Hopes they may meet before three months, and ends the letter, "Yours, lovingly."

October 12, 1860, and addressed, "My dearest Mollie." The recipient is invited to visit Fairfield on the ensuing Wednesday. Suggests to her to come, and not to go to a friend's, but to meet him at the hotel. If it is not agreeable for her to meet him at Fairfield, he suggests a meeting at Mount Pleasant, and suggests she should be at the hotel there also; almost begs for the interview.

Chicago, February 11th, 1861, addressed "My dear Mollie," and is signed A. J. Burroughs, the only letter thus far signed by his full name. Speaks of having not yet seen an opportunity of making \$10,000 a year, and has the blues since he left Burlington.

November 29th, 1860, and addressed "My dear Mollie." Complains that he does not hear from her, and says he fears their letters have been intercepted, and that Mrs. H.— has a knowledge of the relations they sustain to each other. Expresses the fear that their correspondence has been intercepted and inspected by the Postmaster, and by the priest. Was startled at the discovery, and gives as a reason for the inspection that it was discovered Miss Harris contemplated marrying some one out of the church.

August 27th, 1861, addressed "My dear little Mollie." Denies any indication of coldness towards his correspondent, and says there is a strong genuine attachment between them, and one which cannot be suppressed.

September 10th, 1861, addressed, "My dear little Mollie." Speaks of the interest he has taken in their correspondence for three years past; and of stolen kisses in a back room of a fancy goods store, where he was employed as a bookkeeper; and that "black eyes always interfered with his bookkeeping." Says he may go to war.

Tuesday, October 10, 1861, addressed "My dear little Mollie." Warns her against the machinations of some one, and says he soon expects to go to Washington to get a major's commission;

after which his business will require him to be in Iowa, and he expects to be more with her.

January 5, 1862, addressed "My dear little Mollie." He says that in the lowest chamber of his heart there burns a fire for thrice dear little Mollie. Longs for the time when he can meet her and have a long interview with her.

January 19th, 1862, addressed "Dear Mollie." This letter indicates that there had been a misunderstanding between the correspondents; says her requests shall all be complied with, and he will return whatever articles he may have of hers. Says she can burn his letters if she chooses to do so. Adds, in a postscript: "And must this be the finale of our enjoyment? Oh! my God, how bitter!"

March 2, 1862, addressed "Dear little Mollie," refers to an interview in Burlington, and says he feels much happier after it, and longs to have it repeated. Doubts not she also feels better satisfied.

Letters dated April 13, 1862, addressed "My dear girl," and December 28, 1862, addressed "My dearest Mollie." Writer speaks of his early intimacy with his correspondent when she was but twelve years old, and how that intimacy ripened into love; and in the other he gives her advice as to her course of conduct.

Washington, April 20, 1863, addressed "Dear little Mollie," says he does not know yet what his prospects for a position are, and he cannot suppress a feeling of anxiety as to those prospects.

Louisa Devlin (by *Mr. Bradley*): In the Spring of 1863 was in Chicago in the millinery and fancy business there. Moved in July, 1864, to Janesville, Wis. Became acquainted with defendant in March, 1863, in Chicago. She told me she had come to Chicago to look out for a situation. I employed her from the first of May, 1863, as a clerk. She resided with me until she came to Washington. We occupied the same chamber and the same bed. After she came to live with me her health was good. Her temper was good and her disposition also. She was very lively. She went into no society whatever. I saw the deceased twice at our boarding-house in March, 1863; also twice at my store during that summer. She received letters from him. Observed a change in

Miss Harris after the marriage of Burroughs in September, 1863. After the receipt of these anonymous letters, and feeling satisfied that it was Burroughs who wrote them, she became almost frantic, and at such times she would not know what she was doing or saying. During that night she commenced to cry, and continued crying almost incessantly for two or three days. One morning, supposing me to be asleep, after she was dressed she came to the bed, and leaning over me, said: "I have to leave you, but I am sorry to have to leave you." I put out my hands and caught her around the neck, and asked her what she was going to do. She would not tell me. I insisting she then said she was going to have a walk on the lake shore.

She looked as if she did not know what she was doing or saying. I then got her to undress herself and get into bed. One day shortly after, she went into the yard with a large window brush and struck my sister two or three times over the head without any provocation. She was not feeling very well one evening and she called me to the bedside and held me by the wrists. I begged her several times to let me go, but she held me tighter, seeming to have more strength than usual. I remember instances where she commenced to tear up books, clothing, anything that she could lay her hands on. At another time she ran at my sister with a carving-knife. I held her by the shoulders; she tried to leap out of the window into the street. I had to open the door and let her go out, but sent my sister to watch where she went. She at first ran around the street, not apparently knowing where to go, but at last went into the Tremont House. I tried to get her home

but she would not come; when it got dark she came home by herself.

Was that the evening you got Mr. O. H. Harris to go after her? Yes, sir.

He is no relation of hers, as I understand? No, sir.

Do you know of any subsequent instances of excitement before you went to Janesville? Yes, sir, many. One little instance that happened at Janesville, some eight or ten days before she came down to Washington, I remember particularly. Once my sister, having opened a handsome silk quilt to show us, Miss Harris took hold of it and commenced tearing it. I took it from her and then in getting her into her room she hallooed repeatedly, "Let me out, until I spread all the preserves in the house over the carpets." In these spells I had oftentimes to have assistance. Her strength was much greater on such occasions.

This letter is in the handwriting of Mr. A. J. Burroughs:

Chicago, Aug. 7, 1863.

Dear Mollie: I am again in town for a few days and wish to see you. Drop me a note to box 5982, stating where I can see you.

Very Truly,

A. J. BURROUGHS.

Mr. Burroughs, about five or six weeks before he was married, called at my store to see Miss Harris. She never saw him after this interview.

This letter of September 12 Miss Harris brought from the post-office. She read it and then remarked: "Who in the world could have written the

like of this to me?" When I found out what sort of a place it was I proposed to answer the letter and find out who had written it. I wrote an answer and signed her name. (The handwriting of the letter the witness identified as that of Burroughs.)

CHICAGO, *September 8th, 1861.*

MISS MOLLY HARRIS, CHICAGO—*Dear Molly:* I am aware that it is stepping somewhat beyond the bounds of true propriety for a comparative stranger to address a note to a young lady requesting her to meet him, but my hope is that you will excuse the presumption and accede to my request. I have had the pleasure of seeing you several times, but never have had the honor of an introduction. Now, my dear Molly, I have some things to say to you which I know you will be glad to hear, and I know of no better way to say them than for you to meet me, say on Friday, September 11th, at 94 Quincy street, at one and-a-half o'clock in the afternoon. I am perfectly well acquainted with the lady who keeps the house, and I know that we can talk there without interruption. You will, perhaps, have some hesitancy in coming, but you need not have, as I can assure you my sole motive in requesting the interview is that we may become acquainted, and that mutual friendship may result from it. I am confident I can convince you with a few words of conversation, that my sole desire is to be your friend, and I think a meeting would do us both good. Will you come? Do.

If you would rather I would see you at some other place, write where and I will come. If you thing it improper to meet me, I hope you will at least answer this note and state your objections.

Your friend,

J. P. GREENWOOD.

CHICAGO, *September 12, 1863.*

DEAR MISS MOLLY: Your favor of Thursday was duly received, and I was sorry to read that you could not come at the hour I appointed. Unfortunately, I had previous business engagement at half-past three o'clock, which is my excuse for not coming. My engagement was of such a nature that it was almost impossible for me to neglect it. I should have been most happy to have seen you. I have been absent from the city since Friday night; have just returned this evening, and I now embrace the first leisure moment to say to you that I will see you on Tuesday, at half-past two o'clock, at the place formerly designated, (94 Quincy street,) provided it is perfectly satisfactory to you. I am very anxious to cultivate your acquaintance, which I think will result to our mutual good, and I hope you will grant me the privilege of proving to you that I desire only to be your friend.

I will here say I have had the pleasure of seeing you several times, but never have had an introduction.

If you cannot come at the time I have appointed, please say by note when you can come; or, if you prefer seeing me at some other place than 94 Quincy, if you will be kind enough to state the time and place, I will, if possible, see you.

Your friend,

J. P. GREENWOOD.

The answer to the letter of the 8th I mailed myself. In regard to the letter of September 12th, I showed the envelope and the address to the clerk in the post-office and told him to look particularly at the person who called for that letter and describe him to me when I called. He said he would do so. I told him to look particularly at his hand. I called for the answer on the 14th. Miss Harris went with me. He described the man to us. He said he was a man who weighed about 170 pounds; that he had black hair, a heavy black beard, a rather pretty hand for a man of his size, was of medium height and on his finger wore a set ring. Miss Harris said, "that is the ring I gave Mr. Burroughs." Miss Harris handed the clerk this photograph. He said, "Well, yes" and then hesitated but afterwards added, "I do not know, as the beard on this is higher than he wore it." I asked him how much higher; he said, "Well, I guess something about an inch." He said that it might be the same person; that he could tell more accurately if this person was in the clothes he appeared in when he came to the post-office. He said the person who called for the letter was in citizen's dress with a heavy outside coat on. After the interview Miss Harris got very much excited and said she never thought he would turn out to be such a rascal. I went out on that same day to call upon Rev. Dr. Burroughs to know from him if his brother was in town. Miss Harris, when she learned that he had been in town, was more confident that

it was him. She said she would go the next day and return his likeness and all the letters she had of his, to Dr. Burroughs, and would let him know what a great rascal his brother was. She might have been gone over two hours; when she returned she brought them all back. She said she showed the anonymous letters to Dr. Burroughs, and he tried to persuade her to think that it was not his brother who had written them. She then said he acted in such a strange manner towards her, his hand trembled, and she thought there was some plot between him and his brother about the affair. She did not tell him she had these other letters, but concluded to bring them back again. She also told me that she saw A. J. Burroughs coming in in the cars as she was going out; that he poked his head out of the cars and looked at her.

My sister and Miss Harris went to the assignation house on Quincy street; saw that pistol in her possession some time last fall. I asked her what she had bought it for; she said she was not the only lady who carried a pistol. She said she believed Dr. Burroughs and his brother had some plot against her; said it was to pick her up on the street and run away with her where she would never be seen. She admitted she did not know how to use it and then showed me these cartridges as belonging to it. Do not think she knew how to charge it. No. 94 Quincy street is between Monroe and Adams street; it is a very small, narrow street, a kind of alley. Made inquiries

as to the reputation of the house—it was bad. I told her I was informed it was one of the worst assignation houses in Chicago.

She did not have any friends I know of other than the few acquaintances she formed in the boarding-house. She attended her church regularly. She did not read much except newspapers. She had no attendants or beaux or admirers. She told me she was going to be married to Mr. Burroughs in July.

When I asked his brother, he crossed the floor before answering me, then returned and said, "No, my brother is not in town. He left last night for Washington." Then he asked me if I was from Iowa. I never had occasion to restrain her liberty in any way. When she would be in these excited fits she would try to get out on the street. She acted entirely different from what she did at other times. She was at such times incapable of judging between right and wrong. These attacks would sometimes last five or six hours. In my store she took up a very heavy pin-cushion that had a brick in it, that was lying on the table and threw it at a customer.

Q. Hadn't you known Mr. Burroughs to be a man of high character previous to that? A. I did not know what his character was. Did not suggest to her the impropriety of carrying a pistol, or threaten to discharge her if she did not abandon the habit.

To Mr. Bradley: Up to the time of the receipt of these letters had no knowledge of her receiving attentions from any

body else except Mr. Burroughs. I did not communicate these peculiarities to her father because the relations between herself and her father at that time were not friendly. She said it was because she corresponded with Mr. Burroughs; that her father did not consider his reputation to be a very good one. She told me she could not live with her father and had to leave.

Dr. Calvin M. Fitch: Am a physician in Chicago. I prescribed for her in the Spring or Summer for some trifling disturbance of the liver, but the first serious difficulty was in the fall of 1863. Think I saw her at intervals of three or four weeks for some two or three months. During these visits the nervous system was much affected. I found her suffering under severe congestive dysmenorrhoea, arising for the most part as a consequence of the irritability of the uterus; and such uterine irritation always affects the nervous system. In some instances it develops into insanity; and indeed a disturbance of the uterus—uterine irritability—is with females one of the most frequent causes of insanity. She was suffering at the same time a great deal of pain. Her eye was wild. I attribute the wildness of the eye merely to the pain and irritation consequent upon her physical condition, believing that just as soon as the uterus was allayed the whole thing would pass off. Among the moral causes of insanity disappointed affection is one of the most frequent; and we know that among physical causes, uterine irritation is one of the most frequent.

The combination of these two causes we should naturally expect to produce a very much greater effect than either would induce alone.

If a party believed, whether truly or falsely, that the relations which had subsisted between them had been broken off by insult and injury, such an impression, whether correctly or falsely produced, would naturally affect almost any person, even if such person were not of a peculiarly nervous temperament. It would of course affect a nervous person much more; and it would affect with especial force a person laboring under the peculiar physical disability to which I have alluded.

Assuming that Miss Harris was contracted in marriage with the deceased, that she had an ardent affection for him, and she believed, whether correctly or falsely, that he had thus broken off the engagement and endeavored to inveigle her into a house of ill fame, her physical condition being such as you have described, the effect most necessarily and obviously would be the most intense nervous excitement; and it might be that that excitement would be entirely uncontrollable. Assuming that all these moral influences, of which we have spoken, as true, that she had been very much attached to him, and that, under such circumstances, she had encountered him in the Treasury building and taken his life, I should at least be led to believe that there was a strong probability of her laboring under mental alienation. I should not be willing to swear positively that such was the case, because

all these causes might operate upon some patients, without inducing insanity—absolute insanity. Any person would naturally be much excited under such circumstances, and I think that that is nothing peculiar; but the contradictory statements that she makes to Mr. McCullough and to the officer, who had her in charge, are matters of a different character, and would look a great deal more like a serious disturbance of the intellect. She would not be likely, under such circumstances, wilfully to tell a falsehood; but there is direct contradiction there; and, if the witness is usually credible, such contradiction, under such circumstances, would argue very strongly for a serious mental disturbance—mental alienation.

Cross-examined: As an expert on insanity, I have the same acquaintance with it that any educated physician is expected to have.

The dividing line between actual insanity, caused by a disturbance of the uterus and hysteria, might be sometimes as difficult to draw as the line between mental disturbance, arising from any strong emotion, and insanity as a consequence of such emotion—as difficult as it is to tell when a chicken ceases to be a chicken and becomes a hen.

I had no acquaintance with her except professionally. All that I knew of the case was what I saw. I merely judged that the nervous excitement that she exhibited arose from the physical cause, the existence of which I was aware of, and prescribed for her on those grounds, knowing just as soon

as that uterine irritation was allayed this nervous condition would undoubtedly pass away. As to her capacity to control herself in regard to her acts, I could have no opportunity whatever to form an opinion on that point. I do not think any of my visits extended beyond fifteen minutes; and no ethical question would be likely to come up in that time.

After having heard that testimony read, and the alleged indications of insanity exhibited, I would judge her to have been insane when she committed this act. The nervous excitement that Miss Harris exhibited at that time might perhaps have been nothing more than would have been exhibited by any person who suddenly found herself under like circumstances. What looks to me most suspicious in this case, and most like evidence of insanity, is the entirely contradictory statement made by her to Messrs. McCullough and Walter. Were it shown that at that time she was just recovering from one of these attacks, I should naturally expect, on any great cause of excitement being brought to bear upon her, a very much greater impression would be produced upon her than at any other time.

July 12.

Jane Devlin: Am a sister of Miss Louisa Devlin. Have known Miss Harris since she came to Chicago in May 1863. When I met her she had good health, was very cheerful and of good disposition. Have seen Mr. Burroughs at our boarding house two or three times. One evening Miss Harris was sitting on

his lap and he was twisting her curls around his finger.

I went to the house where Miss Harris was asked to go in those two letters—No. 94 Quincy street. Either I or Miss Harris asked if the gentleman had called on the Friday before to meet a lady there. She said "Yes, he had called at noon and remained several hours, but that the lady did not come." She said he had told her that the lady lived on Clark street; that her name was Miss Harris; and he would take his seat by the window, she need not wait on the door, that he would go to the door himself when he saw the lady coming. I asked her to describe the person. She said that he was a man of medium size, rather round shouldered, and had black hair and beard, with bright eyes. She said he used to belong to Chicago but was now engaged in government employ at Washington. I asked her to call at our store and we would show her a picture, to see whether or not she would recognize it as the picture of the one who called at her house. She did call; Miss Harris showed her the picture of Mr. Burroughs. When we first went to the house, she was perfectly cool, and asked the women some questions, but soon got very much excited, and stopped asking any questions, but stood silent, and trembled.

The woman took the picture, looked at it and said that was certainly the person that called at her house. Some day about that time I saw Mr. Burroughs get into a car going out to Cottage Grove.

The receipt of these letters

rendered her very thin and pale; and she was in very poor health after that. She had a good complexion and a very good color. After the receipt of these letters she became very pale and yellow-looking.

The first time I remember seeing her excited was about the latter part of September, 1863. She came into the yard with a window-brush and struck me several times with it. I asked her why she did it and she gave no reply. I remember of her getting greatly excited several times and tearing up books, clothing and such things. She slept very little of nights; often crying all the night, and keeping me awake. Many times of nights, when I would say I would not put up with her crying, which kept me awake, she would get up and go into the next room, and lie on the floor until morning, without any clothing except her night clothes.

It was in January, and the weather was intensely cold.

The second Sunday in January, 1864, she ran at me with a carving knife, without any provocation whatever. She had a letter, or letters, in her hand, and she asked, "Did I wish to read a fine letter?" I looked at it, and, seeing it was from Mr. Burroughs, I told her I did not want to hear any thing more about such a mean, contemptible fellow like him, and not to mention his name in my presence. She wanted to go out of the window into the street. My sister prevented her from doing so; but she insisted. My sister finally opened the door, rather than let her go out through the

window. She went out, and my sister told me to follow her, and see where she went. I did so. She went round two or three blocks, and then stopped a car on Madison street, and started to get in, but did not.

She then went down Clark street and into the Tremont House, the best hotel in Chicago. We went after her at the Tremont House but she refused to come. About dark, however, she came home of her own accord. When in these spells she very seldom said anything. She always sat looking on one object for nearly an hour.

About a week before she left for Washington we had a sister who came to visit us. She was exhibiting to us a very handsome piece-quilt of silk which she had made. Miss Harris got it from her, and commenced to tear it to pieces. It was with great difficulty that it was taken from her.

Cross-examined: Never heard her talk very much about Mr. Burroughs. She has often told me that he deceived her and told me all about their engagements. Often heard her say she would sue him for a breach of promise of marriage. Told her I would not let on I ever heard he was living and would drop him. I have known her to receive attentions from no gentleman other than Burroughs, either of mine or any other name. Do not know of her receiving letters from any other person. She left Janesville the last of December, 1864. Told me she was going to Washington for the purpose of suing for a breach of promise of marriage. Do not know as I said anything

to her on the subject. Had no control over the girl; she was at liberty to go where she pleased. She told me she would return very soon, to resume her duties in our store when she returned. She was entirely capable of attending to all business required of her.

Charles A. Sengstack (re-called): I did not see Burroughs fall, but saw him coming down the steps when a Mr. Callahan caught hold of him. He came down the left-hand stairway on the north side. The room in which I carried Miss Harris is on the south side of the hall. As I entered the hall they were bringing the body of Mr. Burroughs down the stairway. I could not say whether she looked toward the body. She might very easily have seen him if she had been disposed to. She seemed to be perfectly calm and went along with me with her veil down.

Joseph H. Bradley: Saw Miss Harris the third day after her imprisonment. Was applied to take charge of her case; declined until I saw her, and then became her counsel. Have made one species of insanity particularly a matter of study and that induced me to attend more especially to the condition of Miss Harris. On the 25th April there were such developments as directed my attention especially to her, and from that time forth until the commencement of this trial I have made notes from time to time of the facts occurring under my own observation.

Robert Beale: Am warden at the jail. The day after the killing the door of her room was open and I heard a voice. She

was walking with her back to me and therefore did not observe I was by. She had her hands clasped and was walking up and down exclaiming, "I would not have killed him for the world. I loved him better than I do my life. Oh! I would have died for him but he would have ruined me."

On the 20th June when going into her room and taking a seat opposite her she looked at me very intensely for a while, her eye seeming to be entirely suffused. The pupil of her eye was so completely covered up that you could not see it at all.

Anna McWilliams: Am employed as a clerk in the Treasury department. Was residing on the 30th January at No. 14 Lexington street, Baltimore. Three weeks previous I became acquainted with Miss Harris; she occupied the same chamber with me part of the time. She was sick whilst there and just before she came to Washington, the Saturday night before. On this Saturday night she said she anticipated visiting Washington, but could get through her business in the course of an hour or two and would return on the same day. On Sunday night left her awake until a very late hour, probably between one and two o'clock, assorting some letters. She said she wanted to arrange them for the purpose of taking them to Washington the next morning if she felt well enough to go. She intended instituting a suit in Washington against Mr. Burroughs for a breach of promise, and she was going to put the letters into a lawyer's hands. She said she would positively return in the

three o'clock train. If by any accident she was not able to get off in that train, she would leave in the four-and-a-half train.

The evening of Monday we were going together to the colored people's school; Henry Ward Beecher was to review the scholars. She had a return ticket.

Cross-examined: She said she had no other intention than to enter suit against Mr. Burroughs; that she did not wish to recover anything from him, but merely wanted to let the public know that she was not the creature they supposed her to be. Her character had been spoken of in rather an unsatisfactory manner in consequence of the long intimacy which had existed between Burroughs and herself, and she was determined to let people see that she was not what they supposed. She had left her home and gone to Chicago, which she never would have done except on his (Mr. Burroughs's) account; and that he had since deceived her by marrying another woman.

She said she had seen a lawyer in Chicago, and had made some arrangement with him; but thought she had better come to Washington to carry out her plans in suing Mr. B. Her object in visiting Washington at that time, she said, was to know whether he was in the city, for she had previously visited Washington for the purpose, but found he had left the city the evening before her arrival. She purposed visiting Washington again to discover whether he was here, and then intended placing the letters in the hands

of a lawyer during the coming week.

William H. Brown: Was employed in the Treasury Department and was present at the time the first shot was fired at Mr. Burroughs; was about five feet in front of him and about thirty feet off from the person who fired the shot. After the first shot I turned suddenly around and saw a lady standing in the center of the hall in the act of cocking the pistol a second time. Had an impression that perhaps it was some sport; but seeing her raise her hand to fire again and no one in front of me but Burroughs, who had seen her and gone past me, I started towards the stairs. I did not know but what she was insane as she had a sort of a wild look and was firing at random. Therefore I thought if that was the case she was as likely to hit me as anyone else, or if shooting at Burroughs still as liable to hit me as him. So I accordingly started on after Burroughs. When I reached the stairs, glancing around and seeing that he was going to take the left-hand stairs, I went down on the right hand.

Dr. Charles H. Nichols: Am Superintendent of the Government Hospital for the insane. The subject of the mind has been a specialty with me for eighteen years. At the request of two gentlemen I visited Miss Harris in her room in the jail four or five times and conversed with her with a view to ascertain her mental and physical condition. I believe I have heard all the evidence bearing upon her mental and bodily health which has been given before this

court. From my personal observation of Miss Harris, and assuming the testimony under oath, relating to the state of her mind, to which I have listened, to be true, I am led to the following conclusions:

Miss Mary Harris's brain and nervous system are large and active. The nervous temperament largely predominates over the other temperaments of physiologists. She has been affected with painful dysmenorrhœa from the autumn of 1863 to near the present time. Her mental faculties are stronger and more active than the average of women. Her temper is highly sensitive and spirited, but kind and placable. She has not enjoyed the advantages of much moral or mental training. Her character was that of an uncommonly sprightly and engaging girl, who had attracted the notice and regard of highly respectable gentlemen and ladies in Burlington, Iowa, who esteemed her for her intelligence, honorable ambition, and virtue. Both her physical constitution and health, and her mental and moral constitution are such as to render her unusually susceptible to either a physical or moral cause of insanity. She has been exposed at the same time to the physical and moral agencies which frequently cause mental derangement, and those to whose effects she was peculiarly susceptible.

1. *Painful dysmenorrhœa.*

2. Disappointment in love—the sudden and unexpected breaking off a long continued engagement of marriage, in a manner most calculated to deeply wound the sensibilities of a

nervous, proud, and virtuous young woman, and to disturb her reason. From the moment of this *disappointment in love*—this great shock to her delicate moral sensibilities—there was a material change in her spirits and health, and she at times exhibited acts of insane violence. She was unquestionably insane at times during the period between the disappointment and the homicide. The circumstances attending the homicide by *her*, are better explained by the assumption that it was an act of insanity, than that it was an act of malice or revenge. The state of her body and mind since the homicide is calculated to corroborate the theory that there is a continuous morbid susceptibility to mental disturbance, and that the homicide was an act of insane violence.

I do not consider a knowledge of right and wrong in the abstract as a test of insanity; nor even a knowledge of right and wrong in respect to any criminal act that may be committed by an insane person. I, perhaps, in justice to my profession, should say that that view has never been taken by it, though the views of your profession have never been as clearly defined upon that point as have those of mine. I am aware that a knowledge of right and wrong has been, by certain jurists, particularly in England, held to be evidence of responsibility in criminal cases. By "insane impulse" I understand that an individual is impelled, in consequence of disease of the brain, suddenly to commit an act that he is unable to restrain himself from committing. In some instances

there is, probably, a consciousness of the nature of the act; but in most instances I think there is not.

July 13.

Cross-examined: I base my opinion upon the facts and occurrences testified to by the Misses Devlin and Dr. Fitch, and my belief that she was insane between the disappointment and the homicide is corroborated by what I observed myself of her condition and by the facts and circumstances to which Dr. Bradley testified.

I should denominate it a case of periodical or paroxysmal mania. The term, mania, is applied to that kind of insanity in which the excitement is great and general. The term paroxysmal, or periodical mania, is applied to that form of mania, the active symptoms of which recur sometimes pretty regularly, and at other times at irregular periods; and between them there is a greater or less remission in the activity of the disease. While under the influence of these paroxysms of mania that I suppose existed, and still exist, I presume her mind was so far affected as to cause her to have violent impulses, and to be unable to restrain them; and also to entertain either unfounded views and feelings, or entertain those that had a foundation, with a morbid energy, so as to make them appear to her much more important than they would in health. No amount of premeditation and preparation to commit a homicide, in my judgment, precludes the idea that that homicide was an insane act. I, however, deem it equally due to the truth of science to say, that if there is evidence of premeditation and preparation, a much closer scrutiny should be made in respect to the existence or non-existence of insanity, if insanity is supposed to exist. That,

in other words, such premeditation and preparation are calculated to throw more or less suspicion or doubt upon the existence of insanity, or that the act was an insane act. So far as I understand the circumstances connected with the homicide, as testified to in my hearing, they do not of themselves prove the existence of insanity; though I think they were in harmony, in the main, with what usually occurs when an insane person commits a homicide. There appears to have been no effort to commit the act secretly. The best opportunity of committing the act was not embraced, as I think a sane person would have done. There were no efforts to escape; no attempt to palliate the crime by alleging provocation. On the contrary, she expressed her sorrow that she had done it; and her great distress in consequence.

I base my statement upon the testimony of Policeman Walker, Secretary McCullough, and Mrs. Woodbridge. I would regard the prisoner as actually diseased in mind from the date of her disappointment to the day of the homicide.

Mr. Hughes: I desire you to give your opinion from what you know of this case, whether the act here proceeded from an insane impulse? I am of opinion that it did.

July 13.

James A. Conner: I was employed in the Treasury Department. Was down stairs on the third floor at the time Mr. Burroughs was shot. I saw the person when she fired the last time.

When the second shot was fired she turned and passed right by me and went down the west front steps. She walked down at a pretty smart rate, and seemed to be under great excitement. I think that she was very pale. Her eyes looked wild to me.

IN REBUTTAL.

John N. Goode: Reside in Chicago. Saw prisoner during the Fall of 1863 nearly every week; the last time an hour or two before she started for Baltimore. Do not see much difference in her manner. She is not quite so cheerful, of course, as she was then. She has not so much hair as she had at time and looks paler than what she did then. Perhaps, too, she is not so fleshy, but I see no material change. The evening of which I speak there was some little card playing and one thing and another. She seemed very cheerful—seemed to enjoy herself very much. I did not at that time observe any indication of ill-health, either mentally or bodily; observed nothing at all remarkable in her conduct.

Rev. Dr. John C. Burroughs: Am a clergyman; have been president of the University of Chicago since 1858. Deceased was my brother. He came to Chicago early in the Spring of 1861. In September, 1863, two ladies called on me in Chicago, one of whom introduced herself to me as Miss Harris. She put to me the question "Whether my brother were in town or not?" My reply was that he was not; that he had been in town but had left for Washington. She then produced these two letters,

stating to me that she had reason to believe that they or it was written by my brother. After reading the letters, I said to Miss Harris, "Those letters were not written by my brother. The handwriting is not only not his, but he could not counterfeit such a handwriting as that." I then continued: "Miss Harris, you have known my brother a good while, and you are acquainted with his handwriting." I said further, that at the date of that first letter, September 8, my brother was in Washington, while this was a drop letter—dropped in the Chicago post office at that time, as shown by the stamp upon it. I said, "I know that that is so, and can swear to it." I gave the reason why I knew it: that I had correspondence from him, and knew when he left Washington and arrived in Chicago. I then turned to her, and said: "Miss Harris, I wish to know whether, in the long time that my brother has been acquainted with you, he has ever said anything to you, or made any dishonorable proposition, that justifies you in entertaining such a suspicion of him?" She replied he had not; and continued—with considerable feeling, as I observed—to say that he had always been her truest friend, and had never said

a word or done an act which was not in the highest honor; that she regretted that she had entertained the suspicion, and that it never would have entered her mind, but that it had been suggested by others, and that she could not think who else could have written them; and then added, that neither the handwriting nor the circumstances justified her in the suspicion. She reiterated her regret that she had called on this errand, and requested me never to mention the circumstance to my brother. I told her I would not, with the understanding that the subject there dropped. I asked her whether he had violated any engagement to her? She disclaimed any such violation of engagement; and disclaimed the existence of an engagement; but added that there was a long correspondence, and that she had letters, or a letter, of his with her then. I asked her if I might see any she had; and she thereupon produced one, and handed it to me. I read it, and then said to her, "That is Judson's letter." After expressing to her my regret that she should have had any pain or trouble on the account, she retired. I have not seen her from that day to this, to my knowledge.

I taught my brother writing; and have seen him write a great deal. I criticised his handwriting a great deal shortly before his death, pointing out to him faults and errors in his mode of forming letters; particularly found fault with him because he did not write plainly. He has kept books for me, made out bills, copied papers of various

kinds and descriptions for me, and, of course, has corresponded with me very largely, from all of which I have obtained a knowledge of his handwriting and his mode of forming letters. These two letters dated the 8th and 12th of September are not in the handwriting of my brother. My brother arrived in Chicago on Friday morning, September 11. It takes 36 hours, I think, to go from Washington to Chicago. He left Chicago on the 15th of September at six o'clock, p. m. He would have been 34 years old had he lived until the Spring of the present year.

July 14.

Cross-examined: I never saw Miss Harris more than two or three times. Saw her at the University at a public reception when she was introduced to our family and probably by my brother. Never recollect to have met her in the street. Was not aware at the time I saw her at that social meeting that a long correspondence had been going on between her and my brother.

At her entrance and during the conversation Miss Harris was entirely calm and entirely self-possessed until the point where she replied to my question whether he had ever done or said anything which justified her in the suspicion. In her reply to that question when she said he had not and that he had always been her truest and best friend, my testimony was, I think, that she said it with evident feeling. He was married by me on the 15th of September.

I cannot remember any expressions to others, but my general idea was that they had been acquainted with each other—per-

haps interested in each other, and very likely that I may have said that I presumed my brother might have entertained the thoughts of marrying her, but when circumstances changed, and he was unable to afford Miss Harris the means of education, he abandoned the idea. I presume I have said that to Miss Riordan. I have said it repeatedly since the occurrence, as a presumption, and not based on knowledge.

At the time I went to Janesville I called on the District Attorney there, and asked his advice as to what was proper in this case, that having been the home of the party who had shot my brother. He referred me to the United States marshal, Mr. Burbee. Saw Mr. Burbee and requested him to look up the facts in this case—everything bearing upon it. He has done so from time to time; and on being advised that this trial had opened, in Chicago I telegraphed to Mr. Burbee to send any witnesses that he knew of, or such witnesses as he had previously indicated.

Mr. Carrington: You have been asked, sir, in reference to your visit to different places. I suppose you felt it was your duty to have this case thoroughly investigated as far as you could? My motives were these: that in the presentation of this matter at the time of its occurrence, and as I understood it was to be presented by the defense, my brother's reputation and character were more or less involved; and at the request of his widow, for the sake of his child, I could not feel otherwise than interested so far as it affected his

reputation, in having those things cleared up.

Mrs. E. A. Flemming: I reside at Baltimore. Miss Harris on 6th of January last, came to my house to board. She said her business was to go to Washington; that she was not very well, and she was stopping in Baltimore for she did not know how long. Her object in going to Washington, she said, was to collect money for the Misses Devlin—the ladies by whom she was employed. That was what she told me the first evening she came there. Miss Devlin used to do business in Baltimore, before going to Chicago. The prisoner remained at our house until the 30th day of January, the day she came to Washington. She used to go out occasionally to evening entertainments with Mr. Devlin, brother of the lady with whom she was engaged. He was the only gentleman she ever went out with. Subsequently, she said she intended to come down and sue an old lover for a breach of promise. That she had been engaged to him for seven years, and that he had married another young lady, but had corresponded with her up to within a month of his marriage. She thought what induced him to marry this lady in Chicago was the fact of her having money. Her object in instituting a suit she said was merely to clear herself and let the world see that she was a virtuous girl. She said something about two anonymous letters that she had received, signed Greenwood. She believed that Mr. Burroughs loved her, but married the other one because she was rich. She always held him, Mr. Burroughs, in very high estima-

tion—always speaking very well of him.

The previous evening to her coming to Washington Rev. Mr. Dudley was playing a hymn on the piano in the parlor—she got up, picked up one of the ornaments in the parlor and went round to take up a collection. I thought that very strange conduct. She complained very much of her throat and complained of being very weak. She had very little appetite. Sometimes she would be sitting alone apparently engaged in deep thought and then she would get up and all at once commence to sing a love song:

“First she loved him as a brother
And he doubted her when her
love was stronger.”

Then she would come to where I was and appear to be in a very good humor.

Cross-examined: I went to the cars with Miss Harris and gave her my ticket. She was to return that evening. We were to go to a lecture together.

Dr. May: Am a practicing physician and have had an experience since 1834. Had opportunities of judging of the effect of physical diseases upon the mind, but am not an expert on the subject of mental diseases; never made the study of the mind a specialty. Studied it as much as educated physicians do generally, but whenever I had a case of insanity persistent in its nature and strongly developed I did not attend to it myself, but put it under the charge of those who had made the study of the mind a specialty. It would be with a great deal of reluctance that I would give an

opinion in a case where life was involved in regard to the mental condition of a patient, without knowing all the facts, antecedent and subsequent connected with the case. In my opinion the antecedent condition of the patient and the circumstances occurring at the time, do not satisfy me of the insanity of the patient in the general acceptance of the term, without there were facts before and afterwards, to confirm that of which I have no knowledge. The simple abstract question as stated here would not satisfy me that the patient was insane at the time of committing that act.

July 17.

Mr. Bradley here stated to the witness a long, hypothetical case embracing all the evidence given by the defense.

Dr. May: I should say that a patient who had evinced the symptoms as detailed—the antecedent symptoms as detailed and the physical symptoms detailed—who had committed that act as detailed, labored at the time under paroxysmal insanity.

Dr. Young: Am the physician at the jail and have been since the prisoner was confined. I generally saw her for the purpose of examining as to any physical disease, without any reference whatever to mental. Did not observe any physical disease—dysmenorrhoea for instance.

Dr. William P. Johnson: Have been in practice here a great many years.

Dr. Bradley: I submit to you the same hypothetical case put to Dr. May, which please read carefully and then give your opinion as to the condition of

the patient therein described.

Dr. Johnson: It appears from the history that the patient has suffered, as I have stated previously, from dysmenorrhoea, attended with marked symptoms of hysteria. Without being able to say whether she was or was not, at the time of the homicide, in an insane condition, she was certainly in that condition which had previously been characterized by evidence of insanity, and the cause, the most marked that could have occurred, was there to cause some condition certainly analogous to that which had existed from a much slighter cause—though from certain acts of alienation and of violence that she had committed before. I should have said that this patient was laboring under this hysterical condition, and I want here to explain what I mean by hysterical. The ordinary acceptance of that term is not that which is meant by it medically. It is ordinarily understood as something more or less voluntary, as proceeding from a weak mind, and that the person, therefore, is nervous, in the ordinary

acceptation of that term. By the term, as used medically, we consider an individual suffering from hysteria as irresponsible for any act which she might commit. It is just as impossible for them to prevent violence as it would be for them to prevent being drowned, if thrown into water deep enough, and there allowed to remain.

Dr. Thomas Miller: Was in court this morning when the hypothetical case put to Dr. May was read to him. I concur entirely with the views and opinions expressed by Dr. May.

Dr. F. Howard: Have read over the hypothetical case. I would suppose the patient thus described to be subject to mental alienation and that she was subject to insane impulses—possibly suicidal or homicidal mania.

Peter Hartwell, George F. Mosely and E. H. Strong, who had known the prisoner in Chicago and Janesville, testified that they had noticed no change in her conduct. She was always bright and cheerful.

THE INSTRUCTIONS TO THE JURY.

July 17.

The Court met at ten o'clock.

Mr. Bradley submitted to the Court the following prayers on the part of the defense and asked that the jury be instructed therein:

If, from the whole evidence in the cause, the jury shall find that the prisoner committed the acts charged in the indictment in the manner and at the time and place therein named, and thereby produced the death of the said A. J. Burroughs, as therein stated;

And if, from the evidence aforesaid, they shall further find, that when the prisoner committed the said acts she was, either by physical disease or some moral cause not voluntarily induced by herself, or both, operating upon her mental faculties, unable to control her will and actions with reason and judgment in reference to the acts

so committed, then in judgment of law she was insane, and could not be guilty of the offense charged in the indictment, and is entitled to a verdict of not guilty.

Or if, at the time of committing the said acts as aforesaid, the prisoner was moved thereto by an insane impulse controlling her will and judgment too powerful for her to resist, and said insane impulse arose from causes physical or moral, or from both combined, not voluntarily induced by herself, she is entitled to a verdict of not guilty.

And if the jury entertain a reasonable doubt as to the soundness of the mind of the prisoner, as stated in the foregoing instructions, at the time of the committing of said act, she is entitled to the benefit of that doubt, as she would be to the benefit of a doubt as to any other material fact in the cause, for it is one of the elements of the crime charged in the indictment in this case, that the person charged at the time of the committing of the offense be of "*sound memory and discretion*," and without this the offense is not complete in law.

Mr. Wilson presented the following prayers on the part of the prosecution:

1. If the jury believe, from the whole evidence, that the prisoner at the bar left the town of Janesville, Wisconsin, and came to the city of Washington for the purpose of instituting a suit against the deceased for a breach of promise of marriage, bringing with her the pistol offered in evidence, and, after arriving in this city, and armed with the said loaded pistol, on or about the time stated in the indictment, repaired to the Treasury Department, in this city, inquired for the deceased, went to his room in said building, and saw him; then concealed herself, and laid in wait for him, and as he was passing by, fired said pistol at him, inflicting a wound by which he died, and then, cocking the pistol, fired at him a second time, they should find her guilty as indicted, unless they are satisfied by said evidence, beyond a reasonable doubt, that at the time said homicide was committed as aforesaid, the accused had not sufficient reason to know the nature, quality, and character of the act of homicide, and sufficient capacity to distinguish right from wrong in regard to that particular act.

2. If the jury find from the whole evidence that the deceased came to his death at the time and place, and in the manner set forth in the foregoing prayer, they must find the accused guilty as indicted, unless they are satisfied by said evidence, beyond a reasonable doubt, that at the time the said homicide was committed, as aforesaid, the accused had not sufficient capacity to distinguish right from wrong in regard to the homicide, or was from disease incapable to resist the commission of the act.

3. If the jury find from the whole evidence that the deceased came to his death at the time and place and in the manner set forth in the foregoing prayer, and if the jury further find that the accused entertained feelings of hatred towards the deceased, and was conscious that she was at certain periods subject to paroxysmal in-

sanity, and that the presence of the deceased was an exciting cause of paroxysms of insanity, and having previously armed herself with a pistol, voluntarily sought the deceased in the manner set forth in the prayer, the accused is not entitled to an acquittal on the ground that the act of shooting was an insane impulse or caused by paroxysmal insanity, but the jury should find the accused guilty of murder or of manslaughter.

4. If the jury find from the whole evidence that the deceased came to his death at the time and place and in the manner set forth in the foregoing prayer, in order to entitle the accused to an acquittal on the ground of insanity, it is not sufficient for the accused to show a state of mind susceptible to disease, nor is it sufficient that the proof merely shows that it was possible, or even probable, that at the time of the commission of the homicide the accused was of unsound or diseased mind, and subject to fits of insane fury, and was subject to paroxysmal insanity.

5. If the jury find from the whole evidence that the deceased came to his death at the time and place and in the manner set forth in the first prayer, and if the jury further find that at the time of the commission of the homicide the accused was insane according to the evidence and the law as stated by the Court, they should render their verdict in the following form, to wit: Not guilty by reason of insanity, or words to that effect, act February 7, 11 Statute 158, sec. 5, 1857.

6. If the jury find, from the whole evidence, that the deceased came to his death at the time and place and in the manner set forth in the first prayer, in order to entitle the accused to an acquittal on the ground of insanity, it is not sufficient for the accused to show a state of mind susceptible to disease, nor is it sufficient that the proof merely show that it was possible or even probable that at the time of the commission of the homicide the accused was of unsound or diseased mind and subject to paroxysmal insanity; but it must be shown to the satisfaction of the jury, and beyond reasonable doubt, that the act of homicide proceeded from a paroxysm of insanity occasioned by disease, and not from criminal intent.

July 18.

JUDGE WYLIE:

Gentlemen of the Jury: The Court has had submitted to it, by the counsel on both sides, certain propositions, called prayers. I had intended to write out my views on all the questions on which it was proper for the Court to give its views on this most important case. Such has been the pressure of business, I am compelled to restrict myself.

Insanity is the defense which has been set up in this case, as no person but a person of sound mind is responsible in courts of law these days. It is very plain, from the evidence in the case here, that the prisoner at the bar is guilty of wilful murder, or else she is not guilty at all.

Wilful murder is where a person of sound mind and discretion

unlawfully kills any human being in the peace of the government, with malice aforethought or implied.

With these preliminary observations, to which I am compelled to limit myself, I proceed now to answer the prayers asked by the gentlemen in the case.

First prayer for the defense: The Court will grant that instruction, striking out the words, "with reason and judgment."

The second prayer is granted.

The third prayer is refused.

Whatever may be the individual opinion I may entertain on this question, as to which I do not wish to be understood as conveying any intimation, I am convinced the law is not as expressed in this prayer. On the contrary, the Court instructed you that the defense set up in this case must be made out affirmatively, beyond a reasonable doubt, by a preponderance of evidence.

There are to be found some authorities in this country which would sustain the prayer, and I admit that the tendency of the courts seem now to have set in that direction; but the weight of authority is still on the other side, and I feel especially bound, as respects my own course on this question, by the decision in *Foley's* case made by the late Circuit Court of this District in error to the Criminal Court.

The first prayer offered by the prosecution is not granted, for reasons on which the Court has already granted the first and second prayers of the defense.

If, at the time of the commission of the act, the party was laboring under an insane impulse, produced by either physical or moral cause sufficient to dethrone her mind, or if frenzy had mounted the throne of reason, so as for the time to dethrone reason, the party was insane.

The second prayer is granted, with this qualification to be added: "or was impelled to the act by an insane impulse produced either by diseased physical condition, or by moral causes operating on a diseased state of her system, stinging her to madness, and for the time displacing reason from its seat."

The third prayer is not granted.

If the act in question was committed whilst the prisoner was insane in the sense already explained, she cannot be made responsible for it by any conduct, declarations, or behavior on previous occasions, when her mind was under the government of her reason.

The fourth prayer is granted.

The jury must be satisfied beyond a reasonable doubt that the prisoner was not merely liable to the insane attacks referred to, but that the act in question was committed by her whilst she was actually possessed and irresistibly controlled by the presence and power of one of them.

The fifth prayer of the prosecution is refused.

The plea in this case is simply not guilty, and the act of Congress does not require the jury to state upon what reasons they are to find their verdict.

Mr. Bradley: The counsel for defense were gratified with the ruling of the Court, except as to the refusal to grant the third prayer.

THE SPEECHES TO THE JURY.

Mr. Wilson: Gentlemen: You are glad to see that the end of this long and painful trial is now not far distant. For nearly two weeks, with a thankworthy and most patient attention, you have watched the complete unfolding of the dark texture of the prisoner's life, and the unraveling of the blood-stained threads, in warp and woof; and now you are to say whether the colors of that texture, its colors of crimson and of black, are but the shadows of unavoidable misfortune, or the badges of punishable guilt. The prisoner, although obscure and poor, has been able to summon to her assistance an array of counsel representing every phase of professional eminence and excellence; she is so fortunate as to be defended by one whose persuasive eloquence has made the borders of his own State quite too limited to contain his fame; by another, who has lately adorned a high position upon the Federal bench; by another, whose learning has been made conspicuous in many pursuits and offices; by another, the leader of our own bar; and by a fifth, whose talents and industry give promise of his high professional attainments. I say it is gratifying that the prisoner is thus defended, because we may rest assured that this eloquence, this learning, this experience, and this industry, will not leave unvisited any corner of the domains of law, of science, of fact, of fancy, and will find out and exhibit all that there is or can be to palliate or disprove the blood-guiltiness of their client. And I cannot avoid saying that I find another satisfaction in the recollection of your declarations at the commencement of this case, that you had not formed or expressed opinions as to the offense set forth in this indictment. We all know how quickly public sentiment turns its back upon the grave and the dead, and its face toward the living and the present; with what alacrity the funeral-baked meats are offered as a

tribute to youth and womanhood. What, then, are the facts concerning this homicide, with which it is your business to deal today? They are these: The prisoner at the bar, in the latter part of last December, armed with a pistol, sets out on a journey of one thousand miles in search of a man whom she hates, and who she believes, or alleges, has violated his promise to her. When near his place of residence, she stops in a neighboring city; she leaves there all encumbering baggage, and taking the weapon which has been her companion in her travel, she reaches her destination. She arrives here somewhere near the hour of noon. She goes to the Treasury Department, and at the door inquires for her victim by name. She goes to his room, and sees him at his desk. She conceals herself in the hall to await his coming. When he appears—when he is so near that her pistol's point can almost touch him—when it is certain that the ball must do its work—she fires; and as he flies from her, wounded unto death, she cocks her pistol and fires a second time. She then turns and walks slowly along the passage, descends the stairs, misses her way, corrects her mistake, passes through the outer door, and is about to descend unto the street, when she is arrested and brought back; manifests rather less than more of the emotions that would naturally be elicited by such a deed. And we are to see whether, in the capital of this nation, in the very chambers of its civil life, men—aye, the very servants of the public—are to be done to death, are to be shot down, and no law found to punish the act, and no jury found to administer the law. We are to see if, while all the courts of justice are open to those who would redress their private wrongs, a young woman who fancies herself, or, if you please, has been slighted, aggrieved, or injured, is with her own hand to execute the offender, and to receive the approval of those who are the sworn ministers of the law. Juries are the educators of public morals. What lesson do you propose to teach upon this subject? What precedent do you propose to establish? The counsel for the prisoner

ask that you inflict no punishment and express no reproof. They interpose between the accused and the sword of justice a defense. That defense is insanity—a refuge always sought in cases where other refuge there is none. And it is this defense that you are to examine—to examine not as a school of philosophers, not as a society of metaphysicians, not as a board of trustees considering an application for admission into an insane asylum, but as men of honesty and common sense, needing not the speculations and theories of the books, but having the instructions of the Court, and in them a guiding-star, a chart, a compass and rudder, by which you may find and follow that rightful law, whose aim it is, in all the fluctuations of interest, in all the vicissitudes of fortune, to punish guilt, whether in high or low, whether in rich or poor, whether in man or woman. The defense is, as I have said, the insanity of the accused. But fearing to trust to this alone—although, if established, that alone would have been of saving efficacy—they have attacked the character of the deceased. There is in the arsenal of their weapons not only the bullet that destroyed his life, but the poisoned arrows that are to pierce through his name and memory, and wound the heart of the widow, and stain and discolor a child's reverence for a father who died ere its own life began. But their main defense is insanity. What is the insanity, what the character and degree of the insanity, that will entitle the accused to an acquittal? You must be satisfied beyond a reasonable doubt that the accused was at the time incapable, through disease, to resist the commission of the act. The defense does not propose to prove a general state of insanity or monomania; but they desire to show that just enough insanity existed to make this homicide no murder, and that the homicide having been committed, the prisoner has returned to a state of sanity. Their defense is paroxysmal insanity—a defense resorted to when defense there is no other. It has been their object to prove that in September, 1863, a change occurred in the bodily and mental health of the prisoner. They

claim that this change was occasioned, first, by a disappointment in love; second, by a violation of a marriage engagement; and, third, by a great moral shock; and to show whence these three conspirators against her reason came, they refer to the letters of September 8 and 12, 1863. In answer to all that, I refer you to the letter in evidence, dated January 19, 1862, showing clearly that, whatever may have been the relations previously existing, they were broken at that time, and after that date Burroughs wrote to the accused but five letters, and had but four short interviews with her. He was the discarded suitor; she well satisfied with his absence, and to have preserved her sanity; for in all the evidence of her acts during the eighteen months intervening between that time and September, 1863, we hear not a single note of

“Sweet bells jangled out of tune, and harsh.”

In the invention of the letters asking her to meet him at a house of assignation, she never could have been for a moment deceived, and had no belief that they came from Burroughs. The very witness first produced by the defense swears that it was physically impossible that he could have written them. They do not bear the least resemblance to his handwriting; and furthermore, she asserted only two or three days after, to Rev. Dr. Burroughs, of Chicago, that she had no reason to suppose they were written by Mr. Burroughs, and that she was sorry that she had entertained the suspicion, and would not have thought of it unless it had been suggested to her by others. A venomous and malicious attack has been made on Dr. Burroughs by the accused; but he is a truthful, christian gentleman, who has done his duty only, and is beyond the reach of the petty malice of his defamers. If confirmation is needed to add credibility to her story, we find it in the evidence where, more than a year afterward, she states that Burroughs had always treated her as a father. This bungling contrivance of the assignation letters gives to you no explanation of the

homicide. To know its real motive, we have but to listen to the testimony of her friend, Miss Devlin.

A change came over Miss Harris after the marriage of Burroughs. Up to that time she was cheerful and happy. To understand the significance of that we need no doctors learned in the symptoms of paroxysmal insanity and dysmenorrhea. We need only open the red leaves of the book of the human heart. She had loved him; she had, in coquettishness or for a worse reason, rejected him; he had married another; he was lost to her, and she was jealous; her love turned to hatred, her passion to revenge. It is not a new or a strange story. This is not the first tragedy in which a woman has mingled with the wine of her life that "poison more potent than a mad dog's tooth." She tells her counsellor that she hates Burroughs, and does not know what she might do should she see him. A physician is called in soon after that to prescribe for bodily ailments, not to minister to a mind diseased. In the act of the homicide there is evidence not of insanity but of premeditation and of deliberation. "If she was mad, her madness had the strangest frame of sense. Such a dependency of thing on thing as never I heard in madness." In her subsequent conduct, while in jail, he who was acting nurse, counsel, physician, and mental philosopher, saw many touching and sentimental incidents, but an old physician, who saw her every day, saw no evidences of insanity of any sort. The defense has attempted to put the prosecution in a position of antagonism with the medical witnesses. We have too much respect for them as men, and too high an estimate of their professional excellence to oppose them. We agree with them in all they have said. The prosecution put to them a hypothetical case. The defense put to them a hypothetical case, and they gave their opinion upon each. The case of the prosecution was consistent with the evidence; that of the defense was not. In the hypothetical case put, the following facts were presumed to be true which do not appear in evidence: First, that there was a sudden breaking off of a marriage engagement. Second, there was a serious

moral shock. Third, there was a disappointment. Fourth, that the accused did not avail herself of the first opportunity to commit the act. Fifth, that she made no effort to escape. Sixth, that she did not attempt to palliate the offense. Seventh, that she was at the time of the commission of the act suffering from physical disease. Eighth, that there was a sudden and unexpected appearance of the deceased. The disappearance of these facts, together with the opinions of the physician, that all the other peculiarities of her conduct can be accounted for by the existence of hysteria, effectually explodes the whole theory of the defense. It is true that she was susceptible to disease, but in that particular she is not different from us all. It is true, that like Macbeth, she heard voices and saw visions that had no existence, but in that respect she does not differ from all who are visited by the spectres of remorse, and stung by the pains of an accusing conscience. In conclusion, we all know that in our own nature, in all human natures, there is a background of fire, and a world of fierce passions, of hatred, anger, revenge, and malice, that surge and storm against the barriers that confine them, and threaten at each moment to bring ruin upon ourselves and danger and disaster to the public peace. They are not to be kept in subjection by the refinements of metaphysics, or by the witchery of oratory, or by the pleadings of mercy. It is punishment and the fear of punishment alone that can keep our hearthstones unstained by blood, and the paths of our life secure. The pulpit may preach and the press may publish, and we may all approve those great principles of individual responsibility that are enforced by the most solemn enactments of the law, and it is in vain, unless the juries of the land enforce those laws. If the prisoner at the bar was a reasonable being within the instructions of his Honor, it is the law that condemns her, and though there may be tears for her womanhood, and pity for her youth, there should be punishment for her crime.

Mr. Hughes followed for the prisoner.

Mr. Voorhees: It is not necessary for me to attempt to increase your sense of the solemnity of the issue which is placed in your hands. Nor need I dwell upon the fact that this is one of the most remarkable cases ever submitted to a jury for trial. In many of its aspects it wears features more startling and extraordinary than we have hitherto met with in the annals of jurisprudence. There is no man in this court-room, no one throughout this broad land, whatever his experience or profession may be, who has ever seen its like in all respects before.

A few months ago, in open day, in one of the public buildings of this capital, and in the presence of numerous observers, a human being was shot down by the frail hand of the prisoner at the bar, and sent to his final, dread account. The homicide mentioned in the indictment was thus committed; and if it was deliberate, rational murder, then the blood of innocence is crying unappeased from the ground. But what are the elements which constitute this baleful crime? From that hour presaging woe to the human race, when the first man born of woman became a murderer, down to the present time, we have on record the frightful characteristics of the murderer. He is a being in whose heart the fire of malice and hate glow in perpetual flames, in whose face the image of God is blotted out, in whose eyes the light of mercy and love is forever quenched, who lies in wait like the tiger for his prey, and who strikes his unsuspecting and unoffending victim from motives of revenge or the lust of gain. Around such a being there centers every conception of horror which the human mind can embrace. All nature, animate and inanimate, the very earth and sky, recoil from him who bears the primal curse, and there is no communion for his blackened spirit this side of the abodes of the lost.

But turn from this faint picture of a real murderer to the delicate, gentle being before you. We are told that deliberate and atrocious murder has been committed and that the criminal is in court. We are told that a brutal assas-

sination has been accomplished, and that the lurking and ferocious assassin is in our presence. Where, gentlemen, where? Am I to be told that this heartbroken young girl, with her innocent, appealing face, and look of supplicating dependance on you, is the fierce and malignant monster of guilt which is described in the indictment and in the inflammatory language of the prosecution? Am I to be told that her heart conceived and her hand executed that crime for which the Almighty marked the brow of Cain?

Let us pause and reason together for a few moments on a primary question in this case. The life of this defendant, from the days of her early and happy childhood to the present hour, has been investigated and laid open before you. Every trait of her character, all the general incidents of her conduct since she was ten years old have been elucidated and detailed in your hearing. Of what vice has she ever been guilty? In what immorality has she ever indulged? Not one, at no time and under no circumstances. Her life has been amiable, kind, affectionate, blameless, and pure. Troops of friends, of the best and most irreproachable in the land, have gathered about her in her quiet sphere at every stage of her checkered existence. The evidence declaring all her ways for nearly ten years past attest these facts. Then at the very threshold of this case you are to answer this question: can a young and generous mind, wholly uncontaminated with vice, unsullied and unstained by contact with the evil practices of life, without previous training even in the contemplation of crime, at once, while in a healthy state, in the undisturbed enjoyment of all its faculties, incur that awful grade of guilt at which civilized human nature in all ages stands aghast? Is it within your experience that the soil of virtue bears spontaneously the hideous fruits of vice? Are there no gradations in human character and conduct? Where is the hardened criminal who ever ascended the gibbet in expiation of his offenses who has not marked his downfall from small beginnings, increasing gradually and swelling in volume until he was

hurled onward to the commission of those gigantic crimes for which the law claimed his life as forfeit? And yet you are called on to believe that this defendant, at one single bound, sprang from the paths of virtue, gentleness, and purity, without any intervening preparation, to the highest and most revolting grade of guilt and ferocity known to human society. Those who have predetermined her guilt and passed a verdict in advance of the evidence and the law may indulge in this absurd and repulsive philosophy. They may cherish this libel on human nature. And, in doing so, they may as well go further. Let the school-houses be torn down and the churches abandoned. The instruction and moral culture of youth are useless and in vain. The precepts of morality and the principles of religion afford no security to the minds of their possessors from the sudden, instantaneous development of the most appalling wickedness.

In the name of reason and universal experience I utterly repudiate this shocking theory, which the prosecution is forced to embrace before it can proceed a single step against the life of this girl. In the name of undefiled and virtuous human nature I repel it. In the name of innocent childhood and unstained womanhood, in the name of your own dear ones at home, I pronounce it a slander upon those holy attributes of the human heart which tend upwards, and ally us with heaven. I deny that Mary Harris is a criminal. I deny that any murder has been committed. I deny that this young prisoner is responsible for the death of A. J. Burroughs. I assert that his death was not a crime. He was not slain in violation of law, for offenses against the law can only come by those who possess a sound mind and an unimpaired intelligence. And now, invoking your attention, I shall proceed to show you from the story of her life, which must constitute her defense, that it is not your duty to lay your hands in further punishment on the suffering head of Mary Harris, but that it will rather be your pleasing task to open her prison doors and bid her go free, attended by the charitable blessings of all Christian people.

Who is this unfortunate defendant, and whence came she,

when her weary feet bore her still more weary heart to this crowded capital? A short time since, and but few here could have answered; but now all is known. We see at a single glance a gliding, panoramic view of the life of an earnest, devoted girl. Our eyes first rest upon a point nearly ten years ago. At this time Mary Harris was a beautiful and happy child, some ten years of age, in the town of Burlington, Iowa. In that hour of tender childhood the evidence shows that Burroughs first met her; and would to God that in that hour she had died! Gentle memories would have clustered around her peaceful grave, and this bitter cup whose very dregs she is now drinking would have been spared her. There is a mercy at times in death, for which the stricken soul longs and gasps as the parched and feverish earth does for the cooling rain. But He who notes the sparrow fall, and has a design in all the ways of men, ordered it otherwise; and she is here today, weary and heavily laden, but humbly submitting to the Providence by which her own will has been overruled and her actions guided.

Burroughs at this time, gentlemen, was a man of comparatively mature age, more than twice her senior—as he afterwards in his letters declares—almost old enough to be her father. She sat upon his knee in the purity of unconscious childhood. I speak now from the evidence furnished by his own letters of a later period, and also from the testimony of those who witnessed at that time their constant intercourse. He proposed to mold and fashion her mind by the superior force of his own age, experience, and will, in order that she might at a future period make him a suitable wife. There is no room to doubt upon this point. Let those ninety-two letters here produced in court make their appeal. They speak in no uncertain tone. They show us robust, developed manhood seeking the ascendancy over a confiding child. They show us maturity and strength striving for the mastery over inexperience and weakness. He assumes even a paternal interest, and teaches her young

heart literally to leave father and mother and cleave unto him. We hear it stated that no marriage engagement ever existed between them. The miserable desire to inflict indiscriminate punishment upon the innocent as well as the guilty would even deny this plain fact, which is established by almost every line of the evidence to which you have listened. The prosecution itself proved that at one time the very day was fixed for the fulfillment of their often-repeated vows.

Under these circumstances, need I dwell at length upon the imperious nature of the influence which he obtained over her? The child became absorbed in the man. What else could happen? They walked the pathway of life hand in hand for many long years of hope and fond anticipation: He taught her to regard him as her future destiny. He was all the world to her. Her heart opened and expanded under the influence of his smile as the bud becomes a flower beneath the rays of the sun. She grew up to womanhood in unquestioning obedience to his will. The ties by which she was bound to him were the growth of years, and embraced all the strength of her whole being. And did all this have no effect on the subsequent condition of her mind **when disaster came?** He had carried her to the highest pinnacle of happiness and hope. She stood upon the summit of joyous expectations, and all around her was sunshine and gladness. Well might she exclaim to my learned and eminent brother, as she paced her prison floor, "Oh! Mr. Bradley, you should have seen me then; I was so happy!" Yes; though poor and humble, yet she loved and was beloved, and it was enough; she was content. For in that hour, when a virtuous woman feels for the first time that she possesses the object of her devotion, there comes to her a season of bliss which brightens all the earth before her. The mother watching her sleeping babe has an exclusive joy beyond the comprehension of all hearts but her own. The wife who is graced by her husband's love is more beautifully arrayed than the lillies, and envies not the diadems

of queens. But to the young virgin heart, more than all, when the kindling inspiration of its first and sacred love is accompanied by a knowledge that for it in return there burns a holy flame, there comes an ecstasy of the soul, a rapturous exaltation, more divine than will ever again be tasted this side of the bright waters and perennial fountains of paradise. The stars grow brighter, the earth more beautiful, and the world for her is filled with a delicious melody. This, peculiarly, is woman's sphere of happiness. There she concentrates all the wealth, the unsearchable riches of her heart, and stakes them all upon the single hazard. If she loses, all is lost; and night and thick darkness settle down upon her pathway. It is not so with man. His theatre is broader. No single passion can so powerfully absorb him. A variety of interests appeal to him at every step. If disappointment overtakes him, a wide and open horizon invites him to new enterprises, which will relieve him of that still, deep, brooding intensity which is the pregnant parent of woe, insanity, and death to woman.

I am speaking now of general principles; but every word that I have said is applicable to the case of Mary Harris. For when her parents, distrusting Burroughs, and fearing that very treachery which afterwards blasted her life as well as his own, endeavored to break off the connection and wed her to another, who, from their previous history, could for a moment doubt the result? He went to Chicago, and advised her to do the same in order to be near him. Gentlemen, the language which faithful woman holds to the object of her love when the hour of separation is threatened is very old and very beautiful:

"Entreat me not to leave thee, or to return from following after thee; for whither thou goest I will go, where thou lodgest I will lodge:

"Thy people shall be my people, thy God my God; where thou diest there I will be buried:

"May the Lord do so to me and more also if aught but death part thee and me."

It was in this spirit and under these circumstances that

she came to Chicago and resided with the Misses Jane and Louisa Devlin. It was Burroughs still shaping her destiny. It was the man still pointing the course for the child to follow. And shall this be imputed to her as a fault? Will this prosecution, fed as I believe it to be from the springs of private malice, assail her because she trusted Burroughs and confided in his honor? Had Burroughs been faithful to his vows, as he was called on to be, by every attribute which ennobles manhood, by every law human and divine, then this unhappy girl would have been today his respected wife, and the world would have applauded her sublime devotion to him when the truth between them was sought to be poisoned by whispering tongues. Now, because he was false and broke her heart, you are called on to believe that this act abased her virtuous brow into the dust of shame. I repel this calumny. Not only do I pronounce it a slander upon Mary Harris, but it is equally a slander upon the truth, fidelity, and virtue of womanhood. She did no more than what the proudest, the purest, and the best have done in all countries and at all times. She endowed him upon whose arm she leaned with the principles of justice and honor; she crowned his brow with a constellation of all the virtues and then trusted him. She turned her back on home, kindred, and friends and with him faced the world alone.

We are told that no stain shall rest on the name of the deceased. The leading counsel for the Government, at the very opening of this trial, announced, with singular emphasis, as if anticipating your conclusion, that he was a Christian who had lived and died without blemish or reproach to that sacred character. His brother, the Rev. John C. Burroughs, says that his object here is to relieve his name from the slightest opprobrium. Thus we see the purpose of this unnatural struggle for a conviction, in the face of law and evidence which for more than two hundred years have prevailed in the defense of the children of misfortune and providential affliction. Mary Harris is to be condemned, to be carried to the horrid gibbet, that appalling machinery

of death, terror, and lasting ignominy, in order that the conduct of A. J. Burroughs shall stand triumphantly vindicated! I do not wish to assail the dead; but it is expected that this monstrous assumption in favor of crime shall be passed in silence? Shall this trial impress upon the public mind, as a lesson for future action, that it is a part of the Christian character to win the love and confidence of a child, to cultivate her affections as years advance, engage to become her husband, induce her to leave her home in order to enjoy his society, and to escape from another proposal of marriage; and then, after seven years of hope deferred, to dispel all her bright dreams of life by quitting her in a moment, by dropping all connection with her without a word of explanation, by marrying another woman and turning his back on her forever? Government and its officials, churches and their ministers, the press and its editors are all powerful auxiliaries of public opinion, and I have heard their loud and clamorous notes throughout this trial, but when they ask me to subscribe to this idea of Christian grace and human excellence, I shall confidently appeal to you against them all. I am now leaving out of view the darkest aspect of the conduct of the deceased towards this defendant. I am presenting it on grounds where there is no dispute. No honest man can dispute the courtship of the child, the subsequent engagement, the allurements from home, and the final, unexplained, silent desertion, and the sudden marriage of another. His own handwriting, in letters whose genuineness is not called in question, attest these facts. And even if there was nothing but their long and peculiar relation to each other proven, you would easily understand that I have stated the case correctly. Then this is the model without a flaw, the character without a stain, the name without a blemish! According to this new theology falsehood has become respectable, treachery noble, and the base, cowardly betrayal of young, inexperienced female confidence, a qualification for a seat with the just made perfect. I can join in no such wretched blasphemy. I cling

to the old and homely virtues according to whose teachings such conduct has been loaded with infamy from the earliest dawn of civilized human society; and taking my stand on this universal verdict of all ages, this irreversable judgment of enlightened mankind, I say that such conduct is more injurious to morality than murder, that it is worthy of the punishment of death, and that he who is guilty of it ought to die. I do not, it is true, place this defense on that ground, but when the prosecution sees fit to tender an issue upon the character of the deceased in the fact of the black and revolting record of his guilt, it is proper that it should be met. When an effort is openly made to debauch the public mind into the belief that vice is virtue, that turpitude is morality, and that crime against unsuspecting innocence is one of the adornments of the Christian religion, then I conceive that the voice of truth should be heard.

But to proceed. Time passed on with this defendant, bearing her onward to a region of horrors, to the scene of her dismay and ruin; and I must move along on the melancholy tide, and approach the sorrowful hour. We have now traced these parties for years. Burroughs had carried her hopes to the highest elevation. She was looking forward to a future filled with honor and with delight. It was of his creation and there was not a cloud within the scope of her vision. In such a serene and happy moment as this, with no note of preparation to her tender and susceptible mind, with no sign of warning, the blow descended upon her naked head, shivering every hope with which her heart was tenanted, and dashing the temple of reason itself into ruins. Is this statement the work of fancy on my part? Is its not the sad, literal truth? I appeal to you who have heard the evidence. Counsel have seen fit to attribute powers of eloquence to me which I neither possess nor affect. I can only repeat to you a plain and simple story of wrong, misery, and madness which you already know, and which is far more eloquent in itself than any words I can employ. Seven years of love were spurned in an instant.

Seven years of patient hope were turned in a moment to despair. He had lifted her up almost to celestial heights, only that her fall might be sufficiently great to dash her to pieces. Though without sin, yet she was cast out from her place of blissful abode and fell like the sun of the morning to hope no more forever. In order to understand the effect of disappointment and misfortune, we must fully consider the condition of the mind when the shock came. Adopting this rule in the present instance, and we shudder at the bare contemplation of the mental agony of the defendant when she realized that she was abandoned by him for whom she had abandoned all but her honor.

I am aware that the sufferings of helpless woman, under such circumstances, are too often discussed with a sneer. There are those, who go into the catalogue for men, who aspire to be thought wise in the ways of the world, by talking and writing in flippant and witty strains in regard to woman, her sorrows and misfortunes. To such sage and philosophic minds there is no such thing as mental derangement, growing out of disappointed love or broken marriage vows. They are not thus to be imposed upon. The defense of insanity in such cases is merely a cunning device of counsel. Well, gentlemen, I am consoled with the belief that there is nowhere in this court, either on the bench or in the jury-box, one of these ready-made critics of human motives and human conduct, who are always deaf to law, to evidence, and to reason.

I have endeavored, during my humble career in life, to study somewhat the causes which most deeply afflict the human breast, and instil into it the bitterest and most intolerable memories. I think I can sympathize, to some extent at least, with those sensitive natures which are most susceptible to emotions of pain, and which at time wander in realms of gloom, and pray madly to be released from the unsatisfying scenes of the world. You have heard the character of the defendant in this respect fully delineated. She has been endowed by her Creator with the highest capacity

for enjoyment or anguish. It is with her a land of sunshine or a land of darkness. She has but few, if any, medium traits. Dr. Nichols, with the hand of a master, has drawn a picture of those invisible substances known as the mind and moral affections. He has applied his learning and science to the case of this poor girl, and we see the very pulsations of her heart laid bare before us. And, with this plain view of her mental and moral organization, and in the presence of the evidence as I now present it, without its further most cruel and harrowing features, I pronounce the calamity which befell her, by the mere act of his abandonment and desertion, as one of the heaviest that ever broke on the head of youth and confiding innocence. Is there no cause for insanity here? Do these things work no madness in the brain? Do they not rather plant in the ardent mind of woman the corroding canker, which no balm can cure—a consuming fire, which no Lethean waters can quench? I appeal to human experience. It is said that we are manufacturing a defense for this girl. This charge means that we are assuming facts in her behalf which do not exist; that her condition at the time of the homicide was not such as we represent it. Is it not, therefore, a most essential ingredient of this defense to show that Mary Harris had been visited by those causes which have been recognized in all ages as the most prolific sources of insanity to her sex? Must we be told that we are standing on doubtful ground? Do men of sense gape and stare, because we show that the conduct of Burroughs made Mary Harris insane? Did such a thing never happen before? Is all this something so new, that we are to be styled visionary explorers and reckless adventurers? Why, gentlemen, we are simply following a broad, sorrowful, and well-beaten track. It is thickly strewn with the wrecks of human happiness—with broken hearts and ruined intellects. Go to the asylums for the insane—those awful tombs of living death! See that once-beautiful, but now pallid and shrunken face, pressed against the bars of her cell. See the scorching frenzy of her

restless and anxious eye. Her parched lips move, and she calls upon a name which is strange to our ears. She prays sadly, perhaps, to be allowed to go to him. She murmurs the broken lines of some song which they sang together in the days of old. And then upon a sudden, as if a serpent's tooth had struck her bleeding heart, she shrieks out maledictions, and calls down the curses of God on his head. At last she cowers down shudderingly in her corner, where, chained to the barren rock of the past, her one perpetual memory, with beak and talons sharper and more ruthless than the vulture's, preys with ceaseless rage upon her vitals. The name she has called upon is borne by one who is the favorite of fortune, who wears the honors of the world on his brow, who has wife and children blooming under his roof, who has a high seat in the sanctuary—is a "Christian without a stain"—who has forgotten his victim, and is happy. His name may not be Burroughs; but his conduct was not more false, and the ruin which he wrought was not more fatal to peace and life.

Turn to the books which record the experience of the world in this subject and see whether this is picture or dreadful reality. I might detain you hour after hour reading cases of insanity produced by causes similar in kind to those which disordered the reason for the defendant. I shall content myself with but few. I read from Sir W. C. Ellis, page 79.

"E. C., a female about thirty years of age; how long she has been insane is not exactly known. This case, like the preceding, was the consequence of offended pride. She was a fine young woman, but of ambitious views. She, too, had become attached to a person in a more elevated situation of life than herself; and the mortification of being rejected on account of the difference of rank was a wound to her pride which she could not brook; she became incurably insane."

We are not told what became of the man of rank. He most likely wore purple and fine linen, and fared sumptuously every day, while she lived and died forgotten by him; simply "incurably insane." But again:

M. T., aged thirty, has been insane four months. Cause of the attack, disappointed in love. She formed an attachment with a young man about six years ago; and he left her after promising marriage. She says that she has never been comfortable in her mind since, though she has worked regularly until within a few weeks. But she has shown evident symptoms of derangement: she neglected her business and returned to her friends saying her state of mind would not permit her to work. About a week before her admission she passed a whole night in the street and she has since meditated self-destruction."

How like the case on trial this sounds, only that M. T. had far less to crush her to the depths of despair than Mary Harris. In the case cited by the author, she was a woman when she first formed her disastrous attachment. In the case here in court, her love was engrafted on the tender stalk of childhood, and it grew with her growth and strengthened with her strength until it became a component part of life itself. In the case from the book he left her, and that was all. It was not all in the case we are trying; no, not all.

But one more case to illustrate this question.

"M. D., thirty years of age, had been insane only a few weeks. She had been brought up as a dressmaker, but unhappily had been seduced by an officer, to whom she was very much attached; after living with him for some time he deserted her for another. Grief, mortified pride, and jealousy, all combined, produced a state of excitement which ultimately ended in insanity. She had sleepless nights, the natural secretions were disordered, and violent mania was the consequence."

It is true that in this case the additional crime of seduction occurred; but I deny that this fact tends to increase the susceptibility of the female mind to insanity when laboring under grief from disappointed affection. While it brings its load of shame, yet it likewise blunts the fine edge of female pride. While it scalds and blisters the very soul with a sense of degradation, yet the standard of honor is lowered, and the fires of a former virtuous indignation are turned to ashes. The woman is humbled in her own estimation and no longer chafes as formerly under the burden of her wrongs. She has submitted to her own dishonor,

and she abandons thereafter the claim which a virtuous woman has to complain of man's injustice. Pride, honor, and indignation at wrong, are all attributes of virtue, and when they are assailed and aroused to an unnatural action, they are the copious springs from which insanity takes its rise. Let it not then be said that because Mary Harris is pure, her wrongs are less. I have even heard it urged that because, through all the long and intimate years which she passed with Burroughs, she kept the vestal fires of chastity alive in her heart, that therefore her sufferings could not have been so great, when he abandoned her, and attempted to stain her name with pollution, as if she had fallen. This is not my theory of female character. The just, the pure, the good, those who have never consented unto iniquity, are those who, as a general rule, are unable to relieve themselves from those burning memories of cruelty and injustice which so often bring distraction.

But while I have shown, by authority, that the mere abandonment of the defendant by the deceased, under their peculiar circumstances, would have sufficiently accounted for the deplorable condition in which we afterwards find her, yet, as I have said, this was not all. No; gladly would I be convinced that it was. But I now approach a scene of turpitude which brightens all his former conduct by the contrast. He not merely left this girl alone in the world, robbing her of all the priceless treasures of hope which she had laid up in the future, but he endeavored, in the very wantonness of wickedness, to trample her in the mire under his feet; to make her an object of scorn; to taint her name with moral leprosy, and to consign her to odium and shame. I am aware that it is to be urged that Burroughs was not the author of the infamous Greenwood letters. I am ready for that issue. Tell me, first, is there anybody else in the world likely to have approached Mary Harris in that way? Does a stranger thus approach a woman whose name is unsullied? Does a mere casual acquaintance seek thus to gain an intimacy with one whose virtue was never called to ques-

tion? And who but Burroughs was intimate with the prisoner? If there was another, it would have been shown. The brother, Dr. Burroughs, has not slept on the track of the accused. He has spared neither labor nor money to bring before you every item of her brief and now miserable life which might bear hard upon her in this trying hour. He wrote to a brother divine at Burlington to engage his assistance. He went to Janesville to bring every hidden thing to light. He hunted up all those who had ever known her. He associated with policemen, and took them into his confidence. He labored day and night to rake together every grain of evidence which would weigh against her life in the scales of justice which you now hold. And if any one had ever sustained such a relation towards her, except Burroughs, as would have rendered it even remotely reasonable that he wrote these letters, would he not have been discovered and held up in this investigation? If she had ever borne herself toward any one else in such a manner as to warrant a reasonable being in such an advance, that fact would have been proven.

An again: who would have used the language to Ellen Mills, at 94 Quincy street, but Burroughs? The evening on which he waited and watched for the meeting which his letter had requested, he said to the keeper of this abode of sin and shame that he would sit near the window, where he could observe the approach of his victim, and that he would himself go to the door and let her in. Why did he assume this task? Because, as he said, she knew him so well that she would trust him and come in. Who else but Burroughs did Mary Harris know so well? Who else could she so implicitly trust? And above all, who else could so confidently assert his power over her? Who but him, who had fostered the growth of her confidence from childhood up to womanhood? Who but him, on whose arm she leaned so long and so fondly? "She knows me so well, that she will trust me and come in." This alone fixes the paternity of the Greenwood letters. This alone discloses who was that

night waiting for this girl as plainly as if a beam of light had at that moment fallen on him, and made his guilty face visible to every eye in Chicago. I appeal to the candid judgments of all. Was there more than one person in the world who would have spoken and proceeded in this deed of infamy as it is shown that this man did? Look, too, at the phraseology of these letters: "My dear Molly." "Come; do come." Whose language is that? Is it not the peculiar voice of Jacob, though the hand may be the counterfeited hand of Esau?

But still more on this point. It has been well known for months what our defense would be. It has been well known that we would prove that Ellen Mills, the woman of 94 Quincy street, identified Burroughs as the man who plotted and watched at her house, in pursuance of the plans of these letters. It was known to all here concerned for the Government; and it was known to Dr. Burroughs, within a few weeks after his brother's death, that this woman had minutely and accurately described the deceased to Miss Devlin and the accused, and had also recognized his photograph. It was equally well known that a clerk in the post office had done the same. For when these letters were received, the defendant, outraged by their character, took prompt measures to ascertain their depraved origin. A letter was written in reply, addressed to J. P. Greenwood, and the clerk was requested to observe with care who called for it. He identified Burroughs as the man, even to the cornelian ring on his finger, which had been given to him as a token of love by Miss Harris. I repeat, that the prosecution well knew, from almost the first step in the preparation of this case, that we would prove these facts by Louisa Devlin. They also knew then, and now know from the records of this court, that we labored for months, in every form known to the law, to obtain the testimony of these two important witnesses, Ellen Mills and the post office clerk. They were important to us; but if Louisa Devlin is swearing falsely, they are much more important to you, [turning to Dr. Bur-

roughs.] Our efforts to procure their testimony were in vain. What efforts did you make? You say you are here to defend your brother's reputation. If the post office clerk did not say that it was your brother who called for these Greenwood letters, and did not describe him to Mary Harris and Louisa Devlin, why did you not bring him here? If Ellen Mills never made similar statements as to the person who visited her house, why is she not on the witness stand, or her depositions on file? You have brought witnesses here from Chicago and witnesses from Janesville, whose testimony is so immaterial that it trifles with the time of the court. But here are two witnesses who, if our proof on this vital point be false, can prove that falsehood, and relieve your brother's reputation where its need is the sorest; and yet, instead of joining us to bring them here, we find you, by your own extorted admission, listening to the unscrupulous suggestions of a policeman, that one of them at least shall be carried out of sight by the corrupt use of money; and the other one escapes us, although we follow him with an order from the War Department.

Gentlemen of the jury, this Christian minister by profession swears positively that his brother did not write these letters. But does he not stand before this court, before this jury, before the world, and before God, convicted, upon his own testimony, of suppressing the very evidence which would have settled that question forever? There is but one conclusion to be drawn from this fact. These two absent witnesses would have sustained Louisa Devlin; and Dr. Burroughs and this prosecution knew it. They would have described the deceased here in this court as they did in Chicago. This is no forced assumption of mine. It is a well-settled conclusion of law. The suppression of evidence is a grave and almost conclusive presumption against the party that resorts to it. This is more especially true when, as in this case, the prosecution is sustained by the treasury of the Government in enforcing the attendance of witnesses. What is the object of a trial in a court of justice? We

are here in search of truth. We have, each one of us, under the solemnities of an oath, invoked the name and help of God in the discharge of that duty. We stand on holy ground. Life, that mysterious gift of the Creator, is the issue at stake. Its awful import should inspire every breast with a religious desire to aid this court and jury in arriving, if possible, at the exact truth. Then, what shall be said of one who admits that he has not done so? I learn that it is said that no attack can injure Dr. Burroughs; that his position is so exalted that no shaft can reach him. I have no desire to indulge in personal assaults; but no position in life, no assumption of superior piety and virtue, will ever shield the character of a witness who, in a trial involving life itself, conceals material evidence, and then attempts to supply its place by his own unsupported oath. Nor need counsel in such an instance waste their time in denunciation, for no language which our tongues could utter could paint his conduct in colors so dark, in a moral deformity so hideous, as he himself has painted it by his own testimony. Such a witness becomes at once powerless for evil before an intelligent jury. He is dead by his own act. And I submit here now, in all candor, in the face of this court, in the presence of my learned brethren of the bar, and to you the final arbiters of this sad and trying hour, that Dr. Burroughs stands in contempt of this court, for his collusion with the policeman, Douglass, to hide away a witness from its process; he stands in contempt of society, which requires all its members to aid in vindicating justice; he stands in contempt of you, in refusing to bring before you all the evidence in his power to establish a point on which he asks you to find in his favor; and he stands in contempt of the teachings of the merciful Master on the Mount, by coming here with deceit and treachery in his heart to strike this helpless, feeble, sick, and lovely being, to whom his very name is an unendurable misery.

But it is most confidently insisted that these letters are not in the handwriting of the deceased. They may or may

not be. After he is identified as the one who called, in the name of Greenwood, at the post office for a reply, and who waited at 94 Quincy street for the proposed meeting, it is of no consequence whether he guided the pen or dictated to a confederate. The testimony of Mr. Danenhower is deemed material on this point. He says that the leave of absence on which the deceased went home to get married commenced September 8, and hence he could not have been there in time to write them. My answer is, first, that nothing is more common than for clerks to leave a few days in advance of the date of their permission; and, secondly, that, in addition to the identification by Ellen Mills and the clerk at the post office, it is in proof that Louisa Devlin and Mary Harris both saw him at times corresponding very nearly, if not exactly, with the dates of these letters. This is conclusive. There are but two witnesses in the world who could have contradicted these facts. Dr. Burroughs knew they would not contradict them, and he therefore kept them away, with the aid of "a hundred dollars or two," as suggested by the policeman, and came here himself to contradict them.

It will be asked, however, what motive Burroughs had to thus compass the destruction of one whose image, if he was human, must have been blended with his tenderest memories, with the most sacred associations of his heart. A refuge will be sought in this inquiry, from the irresistible pressure of the proof which thus far shatters all the assumptions and theories of the prosecution. Why—why did he do this deed without a name for cruelty and perfidy? You will be told that all the actions of sane people have their intelligent reasons. This is true; and the history of this case gives a ready, an instant answer to this inquiry. His motive was not the gratification of passion. Lust was not one of the elements in his calculations. Base and wretched as are such motives of action, yet, if it be possible, those that actuated Burroughs were still lower and more depraved. Look calmly at his situation. From Mary Harris

he was about turning away without a word. He knew that such an act would be to her as appalling as the voice of doom. His conscience made him a coward. He could not face her with the story of his stupendous crime. He could not look into her confiding eye and tell her that his whole life towards her had been one mighty falsehood. Human nature, however depraved, was not equal to such a task. The past was filled with voices of reproach and terror to his guilty heart. The future frowned on him full of menace and warning. The present was haunted by a sense of conscious wrong from which he tried in vain to escape. He knew, too, that he was in her power. These letters which are here in court, and many others not here, arose in his memory. He recalled that one in which he says: "And Mollie, if from any reason whatever I may change my views or feelings towards you, and I should feel like entering into a matrimonial alliance with any one else than yourself, I will promptly advise you of it." He was about taking that fatal step but he had not the manly honor to fulfill his promise. He, however, like one who plans the commission of a crime, took measures for his escape. He was to be married in a few days to the unhappy lady who now mourns in her widowed home, and whose melancholy fate I deeply commiserate; and he knew that when that fact reached the ears of Mary Harris, her cries, her sobs, her voice of wailing would ascend like perpetual lamentations in the air. She might, in her deep distress, utter his name to the world in such a way as to stain his character as a Christian. She might come near him some day and remind him that he once took a child from her parents' roof, and broke her heart. Aye, it was in her power to denounce him as false and infamous at all times and places, to pursue him, if she desired, as an avenging shadow, to rob him of peace, and to turn his days and nights into fear and alarm. But if her foot once crossed the threshold of shame she was in the fowler's snare and at his mercy. If this defendant had ever entered 94 Quincy street, Burroughs

would have breathed easy, and gone to his approaching nuptials a free and happy man, secure from molestation at her hands. Her mouth would have been closed forever. It was not her soul that he expected to pollute, but her name. He intended to have been able to prove that she was seen to enter this wretched house, and to hold that fact in terror over her. If she struggled and cried out against her cruel fate, he could silence her. Or if she refused to be still in her sufferings he could close the ears and steel the hearts of all virtuous people against her. If she entered that house she would come out covered with an everlasting mildew. Her heart might be as pure as before, for she was unconscious of its character, but her name would be spotted with an incurable leprosy. Burroughs had made up his mind to break his engagement, of long years standing, with Mary Harris; and the Greenwood letters laid a plan by which he was to justify that heartless act and silence her complaints. Is there no motive in this? We find him capable of one wrong towards her. He deserts her without cause. Is he not capable of committing the other, when he has a powerful motive in his desire to escape the consequence of the first? If he could, in the hour of his desertion, render her powerless and despised, he was safe and free. The one absorbing purpose of his heart at that time was to sever the tie that bound them together, and when we find him unwilling to do so by an interview, we are prepared to believe that he attempted to do so by consigning her name to ignominy and pollution.

Gentlemen, you now have my views upon that branch of the evidence which relates to the Greenwood letters and all their criminal surroundings. I hold—

First. That it is not reasonable from the whole evidence that any one else but Burroughs wrote them.

Second. That Ellen Mills and the post office clerk identified him fully as the man.

Third. That if he was not their author it was in the power of this prosecution by bringing these two last named

persons here as witnesses, to have conclusively shown that fact.

Fourth. That instead of procuring the attendance of these parties, we find those who are in the interest of the prosecution. Dr. Burroughs and Douglas, the policeman, engaged in planning the suppression of their testimony; which fact in itself creates a presumption of law in favor of my position.

Fifth. That Burroughs had a powerful and controlling motive to write them.

But now allow me to say that, for the purpose of our defense, it is only necessary to show that Mary Harris actually believed that he wrote them, and that they thus became one of the exciting causes of her mental agony and derangement. But I have preferred to show not merely that she believed him to be the author, but also to show that she had overwhelming reasons for her belief—reasons from which there was no escape. No woman who truly loves ever willingly consents to blacken and deface her own idol. She rather clings to him in blind adoration long after the proofs of his treachery have become visible to all eyes but her own. And who will say that this defendant jumped to conclusions on this point against the deceased? On the contrary, when her fears and suspicions were alarmed, with what conscientious care she proceeded. Step by step the painful truth was pressed upon her. The woman of Quincy street described him. The clerk did the same. But she did not stop there. She was perhaps convinced, for the letters in themselves to her practiced eye contained terrible proof; but she had some hope of relief, in some way, not yet well defined in her thoughts from an interview in another quarter. This young girl, then but eighteen or nineteen years of age, gathered up the letters of the deceased, took his miniature, took all that related to her seven years of love and hope, and knowing the standing of the Rev. John C. Burroughs, knowing his religious character, went to him like a child to a father, and poured out her grief and her fears. How like the pure and noble girl that she was!

But here we are involved in a contradiction as to the day on which this call was made. Dr. Burroughs says that she came on the 16th day of September. I do not believe him. His brother was married on the 15th, and I do not believe him, because, in order to free himself from reproach, it is necessary for him to fix his interview with the defendant subsequent to his brother's marriage. I do not believe him, because Louisa Devlin swears that it took place on the 15th. I do not believe him because Jane Devlin swears it was the 15th. I learn that they are to be assailed in the interest of Dr. Burroughs, in order to sustain him. Let it be so. You have looked upon those two honest, truthful faces, and observed their patient candor under the most protracted examinations. They have been the good angels of human nature in this case. They were the friends of Mary Harris in sunshine, and they have abided through darkness. Others may have shrunk from her side, but they have stuck closer because of her calamities. Like the petrel of the sea, their friendship has spread a stronger pinion and pursued a bolded flight in the midst of the lightning and the tempest. Are such pure and unselfish beings as these to be degraded by counsel in order to support the testimony of one who appears in this case more like a criminal than an honest man? Make the contrast between them, gentlemen. Who failed to note that damning hesitancy of manner which caused every eye in this court-room to rest upon him with suspicion? Who could fail to perceive that he was weighing the effect—not the truthfulness—of his answers before giving them? Who ever heard an equal number of qualifying adjectives expressive of cautious doubt and uncertainty used in the same space of time as when he was under cross-examination? No, his oath will not weigh an instant in your minds as against theirs. You will believe, from the evidence, that the defendant and Dr. Burroughs met on the 15th and not on the 16th of September.

But if you will allow me, I will state another reason why

it was on the 15th, the day of the fatal marriage. The law gives the prisoner the right to stand where I am standing, if she had the power to do so, and speak for herself. I am but speaking for her, and in that capacity, I have the right to say that it was the 15th, because she says so, because that awful day has left an indelible scar on her brain that fixes her recollection. And every word that has fallen from her pallid lips on this subject, has carried truth to my mind. Dr. Nichols has sworn to her exalted sense of truth and female virtue, and a mountain of oaths by Dr. Burroughs would not shake my faith in her integrity. I do not believe at this dreadful moment she would purchase her life by the utterance of a falsehood, no, not even to escape that death from which we shrink back in speechless horror.

Thus, then, these two persons met on the 15th of September, 1863. Dr. Burroughs says a woman came with the defendant. If we were manufacturing a defense we would say so too, and have one of the Misses Devlin to personate this third party, and then by her testimony show what took place at this interview, and contradict Dr. Burroughs. But it is not true. Mary Harris went alone, and I am somewhat at a loss to know why this unknown woman has been conjured up. If she has a real existence why was she not brought here, as so many others have been, to uphold, if possible, the private part of this prosecution?

Let us, however, now examine for a few moments the account which Dr. Burroughs gives of that meeting between himself and the prisoner. He admits she came to see him in regards to his brother, and that she apprized him of her long and intimate relations with him. The Greenwood letters were submitted to him, as also her reasons for believing that the deceased wrote them. She was in grief and trouble on that account. She inquired whether he was in Chicago. Dr. Burroughs admits to Judge Newman that he knew of their long correspondence; but while asserting that this interview took place on the day after his brother's mar-

riage, he is forced to admit that he did not inform her of that fact. Why did he so carefully conceal his brother's marriage of the day previous? Why did he not tell her the truth? He admits that he did not do so. He says that he asked her if his brother had broken any engagement with her, and that she said he had not. The force of this answer will be fully appreciated when it is remembered that at this time the defendant was not aware that the deceased was married, and that this reverend witness was purposely concealing that fact from her.

But he says that Mary Harris told him that no marriage engagement had ever existed between her and his brother. Now, gentlemen, if she had made such a statement to Dr. Burroughs on that occasion, it would constitute a marvel and a wonder in the history of human nature. It would stand alone as a contradiction of the universal experience of the world. Here was a young girl for the first time in her life in an agony of apprehension for fear she was about to be betrayed by the man whom she loved. The fact that she was engaged to marry him does not admit of a doubt. That is all clear now. Some trouble had even at one time arisen because she was about to marry out of the church—that is, to Burroughs. You remember his own letter on that point. No one now disputes the engagement. You are called, then, to believe that this defendant, going to Dr. Burroughs on the very subject of her relations with his brother, to whom she was in fact engaged—the evidence of which she carried with her to show to him, complaining also of the contemplated breach of faith—that she, under these circumstances, told an absolute falsehood and of such character as to utterly deprive her of all claims upon the accused or of any right to inquire of his movements or conduct! In other words, we are to believe that she bore false witness voluntarily against herself upon a subject of the most supreme and sacred moment; that while discussing her rights with the deceased, she admitted she had no rights; that while hunting for him with nearly a hundred of his

letters in her pocket promising marriage, she deliberately settled the whole case against herself by informing his brother that there was nothing whatever between them except the ordinary relations of friendship. What an interview, according to Dr. Burroughs! He knew of the long intimacy and correspondence, as he told Judge Newman. She came to him on the 16th, as he asserts. She wanted to know where A. J. Burroughs was. He told her he had left the city the day before. The Greenwood letters were discussed. And then Dr. Burroughs became inquisitive. How important, too, were his questions! He must have foreseen this trial. At least he must have been qualifying himself to swear in an action for a breach of marriage promise. He asks her if any marriage engagement existed. She frankly says no, when she holds in her hands at that moment the evidence to the contrary. He asks her if his brother had ever made any dishonorable proposals to her, and she again answers no, although she at that time was painfully impressed with the fact that he had attempted to allure her into a house of ill-fame. Another very comprehensive question: Had the deceased ever broken any engagement with her? and once more she gives the necessary answer in the negative. There this extraordinary interview quietly ends by Dr. Burroughs forgetting to tell this distressed girl that the object of her solicitude, and in whom indeed they were both so deeply interested, was married on the day before. This is the testimony of Dr. Burroughs, as given in your hearing. Is there a man in the world, of common intelligence, who will believe it? Is it not monstrous and most unnatural? It sounded from the witness-stand like ironical fiction, told to provoke a stare and a smile, and in that it succeeded. The defendant went to Dr. Burroughs for information, and came away almost as ignorant as she went. Dr. Burroughs, on the contrary, made that the occasion to cram himself as a witness to every phase which any judicial inquiry might ever assume between them. He says that he is here simply to protect his brother's reputation, and he

certainly betrayed an early knowledge that it would need protection.

But in this connection allow me a word as to his purpose here, and the spirit in which he has testified. It has been well known for many months that we would defend Mary Harris on the ground that grief, disappointment, and despair, connected with a severe physical disease peculiar to woman, and in itself a constant source of insanity, had given rise in her mind to recurring periods of mania; and that at one of these periods she committed the act for which she is now on trial. Well, has not Dr. Burroughs entered the lists upon that issue? He says that his only care is for the character of his deceased brother. That would be commendable; but is it true? He has taken pains in different ways to convince the counsel for the defense, as well as this court and jury, that he does not wish to have the defendant convicted, but that "she ought to be sent home to her friends." Then why, may I ask, is this long array of witnesses brought here by him, to put up their crude and unlearned opinions against the medical evidence on the subject of her sanity? Was it essential to the Christian character of A. J. Burroughs to prove that here and there, at Chicago, at Janesville, and elsewhere, a man, a woman, or a child had met Mary Harris for a few passing moments, and did not discover that she was insane? No. This evidence can have but one purpose. It aims at the life of the prisoner. It in no wise touches the character of the deceased. It is a bold demand on the part of Dr. Burroughs for blood. It is the key which unlocks and reveals the meaning of his presence, and of all his evidence in this case. Oh! spirit of eternal justice, what more is this poor shivering victim of man's cruel perfidy to suffer! Is it not enough that one drove her mad, and caused her to cry out—

"I am bound
Upon a wheel of fire, that mine own tears
Do scald like molten lead?"

And must the brother come now, and struggle to drag this

wan, emaciated, and stricken being to an awful and ignominious death? Is he not satisfied with the ruin already wrought? Are you not ready to exclaim, "Spare her, Dr. Burroughs; oh! spare her! Spare her for the sake of the name you bear. Enough she has suffered in that name. For the love of God and for the sake of His mercies spare her broken life. Do not press and trample on the fallen and undone. She may meet you no more in this world. You may forget her mortal agonies in the honeyed commendations of your followers. But there comes a day when the one who murdered her peace, and the one who now seeks to murder her life, will both meet their victim in the presence of the Great Judge, and in a court above the sun, where misfortune is not a crime, and where earthly distinctions fade away; where the poor are rich, and the merciful blessed; where the feeble are strong, and the oppressor's rod is broken; and in that awful presence they will be called to answer why, at their hands, Mary Harris was beaten and scourged to madness and death. Spare her; oh! spare her! lest, if you succeed in your purpose to slay her here, she will confront you in the eternal world as a bright angel, with her fair hair dabbled in her own innocent blood, shed by your hand, and there shriek into your shrinking ear, 'False, fleeting, and perjured!'"

Alas! how often the great rules of right—eternal and unchangeable right—are perverted in man's administration of justice! How often the accused should be the accuser! How often the unoffending sufferer bears the punishment due alone to others! What a scene is this in which we are all engaged! Here before you, sits one of the feeblest and saddest beings ever born of woman—a mere helpless atom, buffeted and driven here by angry and malignant winds. The babe in its mother's arms was never more unconscious of the evil purposes of crime, than the heart of this pale and wasted prisoner. Yet the freezing terrors of the law surround her on all sides; the judge upon the bench, with wise and patient calmness elucidating its principles; this

jury, listening to the story of her blighted life, and solemnly weighing the evidence; this crowded and anxious audience watching the result; and men, bearded men, earnestly discussing the issue, whether she may live or die! And why all this? Because, as she said to you (Mr. Bradley), "I have been beaten and scourged without cause." Yes; bruised, maimed, and mangled, until the divine gift of human reason gave way, utterly powerless, with less than the instinct of the poorest worm, that resents in blindness the heel that tramples it to dust. And yet this is the being against whom we are to listen to a hue and cry as if she were a monster, a Borgia, or a Hecuba!

Gentlemen, I sometimes tire of life when I see wrong and injustice spreading their prosperous branches as the green and flourishing palm; when those by whom offenses come in this world, who prey upon virtue and turn it into vice, who sport with innocence in order to poison it, who make a mockery of love and a plaything of truth, go not only unscathed of the law, but even applauded by the hired panderers to a depraved and debauched public sentiment. Whatever of philosophy I have takes a painful and gloomy form, and I feel that I could say with the great dramatist:

"Out brief candle,
Life's but a walking shadow; a poor player
That struts and frets this hour upon the stage,
And then is heard no more; a tale told by an idiot,
Full of sound and fury, signifying nothing."

Gentlemen of the jury, I have now, to the best of my ability, discussed the evidence relating to the first proposition of the defense. I am reasoning from cause to effect; and we have maintained and proven that in the case of the prisoner there existed overwhelming causes of insanity. To establish this great fact, I have thus far dwelt upon her relation to the deceased, the hopes he inspired in her breast, the power he obtained over her will and destiny, their final separation, and the aggravating circumstances by which that separation was surrounded. But although these moral causes alone, more than account for her subsequent condition, yet

at this point I wish barely to call your attention to the testimony of Dr. Fitch. He is a gentleman of standing in his profession in Chicago, and attended the prisoner in her illness soon after Burroughs had abandoned her. He states that he found her laboring under a painful disease peculiar to her sex; and every medical man in the world, and every book ever written on that subject, declare that this disease is a constant physical cause of periodical, or, as it is more properly termed, paroxysmal insanity. I shall not discuss or dwell upon this fact. It is only necessary to state it, and to remind you that it is in proof that she was suffering from one of these attacks when she entered the Treasury building on the fatal 30th day of January. In this most important feature of the case there is no conflict of testimony, and no room for doubt or conjecture. Where, then, in the whole range of judicial history, was there ever shown a more powerful combination of causes, in the same person, of mental derangement? The well-known moral causes existed in malevolent force; and in fearful alliance with them was a physical disease which is recognized as one of the principal causes of mischief and malady to the female mind. Shall we, then, any longer wonder that, with her delicate nervous temperament, she fell before such a terrible combination? Would it not rather be matter for astonishment if her mind had survived in calmness and health all these shocks? But now, having inquired into and summed up the causes, let us explore the ground still before us, in order to discover, if we can, whether the effects of those causes actually did occur in this case. Let us lift the curtain for a few moments, and look upon that shifting scene of suffering which her life continuously presents, from the 15th day of September, 1863, to the present hour.

We behold, for once at least in our lives, a human being totally transformed. The change is complete in every respect. Physically, she is no longer the same. Her former buoyant health withers away. The bloom of her face dies out, as it were, in a single night. Her already slight frame

becomes still slighter. Sleep, the gentle nurse in whose arms the peaceful invalid woos the returning spirit of health, fled from her eyes. Burroughs had murdered sleep; and her mind was fixed with an appalling intensity on the memory of the past, which was to her brain as a consuming fire. From this horrible spell there was no escape. Ellis, from whom I have already quoted, says:

"But in those cases where the over-action of the brain has been brought on by thinking too long and too intensely on painful truths, from which there is no escape for the patient, it is exceedingly difficult to divert the attention, and to prevent the mind from dwelling upon them so continually as to produce disease; for although patients are conscious of the injury they are inflicting upon themselves, and of the inutility of their over-anxiety, and judge most accurately of their situations they do not appear to possess the power of controlling their thoughts."

No; and hence we see her mind developing its changes in equal pace with her body. It is the seat of the canker, which blighted her whole system, and which no medicinal balm can reach. There was lodged that perilous stuff which no drug can purge from the distracted breast. According to the evidence, she was up to that period the merriest and the most joyous of her circle. The world, the glad earth, the opening day, the bending sky, and the kind faces of friends were all beautiful to her, and she enjoyed the few years of her unclouded happiness. But now the laugh was gone; no merriment kindled in her eye; the future to her was dead; she lived in the past and it was the charnel-house of all her hopes and over it hung the mourning cypress. I am reading her condition to you by the light of the evidence alone. I am showing you that effects were following causes. She grew weary of life. Who does not, when all that gives life its value has perished? This is, in itself, one of the incipient stages of insanity. It is the off-spring of that "Black Melancholy," which all authors designate as one of the parent springs of madness. And when this defendant rose that morning from her bed, and murmured her farewell to the friend, whom she supposed to be asleep, had she succeeded in taking her "walk by the lake

shore," in the darkness before daybreak, she never would have been here on trial. The winds and waves have sung her requiem. There might have been an inquest, and the usual verdict.

"One more unfortunate
Weary of breath,
Rashly importunate
Gone to her death."

Perhaps there would have been an item in the papers of the next morning. Men would have read it listlessly over their coffee, and forgotten it during the breakfast. And yet in that item would have been contained the account of a wreck of more infinite and incalculable value than all the richly-laden argosies that ever sunk beneath the surface of the deep. It would have told of a ruin which calls upon Heaven, Earth, and Hell, as its interested witnesses. It would have recorded a crime, which rises in mountain blackness against the soul of the betrayer of innocence. But the purposes of the suicide were defeated, and we are left to still further notice her total transformation of character.

How shall I dwell upon those unnatural outbreaks of violence which occurred towards those who were the beneficent guardians of her daily life? We have found the developments of suicidal mania, and alas! we now discover the unmistakable symptoms of homicidal insanity. This whole evidence shows her natural disposition to have been most amiable, gentle, and affectionate. She now, at times, lost all these once familiar traits. Where is the man of science who does not see at a glance what all this means? Do the moral affections and the mind all undergo a sudden and radical revolution, characterized by irrational actions, while all the functions are in a healthful condition? As well ask whether the dove can change itself at pleasure to the kite, or the lamb to the ravening wolf. If Mary Harris was not insane when she aimed a large and deadly knife at the breast of her dearest friend, then human character can assume the hues of the chameleon at will, and there are no

rules by which human motives can be fathomed. Again she attacks Louisa Devlin, at another period she assaults a customer in the store, at another she is so violent that her friends imprison her in her room by force, and at another she escapes and flies along the streets at night, and is secured and brought back, only after great exertion and difficulty. She tears articles of domestic use to pieces, and in every way, at stated intervals, displays a morbid propensity to destroy.

This form of insanity is too well understood to require at this time a minute discussion and a full citation of authorities. I wish, however, to dwell briefly on some proper distinctions to be observed. We find the most eminent authors fully recognizing the existence of an insane impulse to commit deeds of violence by persons apparently perfectly rational on all other subjects, and acting without the slightest provocation. Ray, in his great work—*Medical Jurisprudence of Insanity*—uses the following language:

“The last and most important form of moral mania that will be noticed consists in a morbid activity of the *propensity to destroy*; where the individual, without provocation or any other rational motive, apparently in the full possession of his reason, and oftentimes in spite of his most strenuous efforts to the contrary, imbrues his hands in the blood of others; oftener than otherwise, of the partner of his bosom, of the children of his affections, of those, in short, who are most dear and cherished around him. The facts here alluded to are of painful frequency, and the gross misunderstanding of their true nature almost universally prevalent, excepting among a few in the higher walks of the professions, leads to equally painful results. In the absence of any pathological explanation of this horrid phenomenon, the mind seeks in vain among secondary causes for a rational mode of accounting for it, and is content to resort to that time-honored solution of all the mysteries of human delinquency, the instigation of the Devil. Of the double homicide to which this affection gives rise, there can be no question which is most to be deplored, for shocking as it is for one bearing the image of his Maker to take the life of his fellow-being with brutal ferocity, how shall we characterize the deliberate perpetration of the same deed under the sanction of law and of the popular approbation? We trust, however, that the ample researches of writers of unquestionable veracity and ability which are now just reaching the attention of the legal profession, will be soon followed by a conviction of past errors, and a more rational administration of the criminal

law." * * * "Esquirol, in his valuable memoir, first published in the shape of a note in the French translation of Hoffbauer's work, observes that homicidal insanity or *monomaniae-himocide*, as he terms it, presents two distinct forms, on one of which the monomaniac is always influenced by avowed motives more or less irrational, and is generally regarded as mad; in the other, there are no motives acknowledged nor to be discerned, the individual being impelled by a blind, irresistible impulse."

After citing a number of cases to illustrate his views, this enlightened author further says:

"In most cases of homicidal insanity the presence of some physical or moral disorder may be detected, and though none is mentioned in those above related, there is reason to suppose that it might have been ascertained by a more thorough examination."

In the case now under investigation in this court, both physical and moral disorders of the most painful and afflicting character have been discovered. We do not claim that this is one of those cases which, as Ray observes, have so often baffled the mind in their solution. On the contrary, we show you a person sick in mind and body, and assert that such functional disease of the brain ensued as to impel to this strange and irrational course of conduct. We are involved in no mysteries. We have the causes, and the effects have followed. A mind overstrained in the perpetual contemplation of a harrowing theme, and a body broken by painful disease, gave rise to a paroxysmal insanity which assumed the destructive form. Ray, speaking further on this subject, says:

"In nearly all, the criminal act has been preceded, either by some well marked disturbance of the health, originating in the head, digestive system, or uterus; or by an irritable, gloomy, dejected or melancholy state; in short, by many of the symptoms of the incubation of mania."

In the light of these authorities the conduct of the defendant seems no longer wonderful, and we are not compelled to look to the malicious contrivances of a depraved heart for its solution.

But we have heard it urged by the prosecution, with an air of triumph, that there is at least one act on her part

which clearly proves her a rational being. She bought a pistol. Now, if any one thing in her whole history more than another proves her periods of insanity, and especially on the subject of her misfortune and bereavement, it is this act itself, and the circumstances under which the purchase was made. To one, when questioned, she replies that other ladies besides her carry pistols in Chicago; but her real reason, as you will remember she stated it, was one of those frightful ideas which pursue the startled and suspicious minds of the insane. She said that she believed there was a scheme between her false lover and his brother, Dr. Burroughs, to pick her up in the streets some day and carry her away, where she would never be heard of again, and she meant to be ready to defend herself. She was haunted and pursued by this irrational fear. Says Ray again:

"In general, in mania, especially the early stage, the mind is filled with vague fears, suspicions, jealousy, and distrust, and the thoughts are sadly confused. The patient believes that enemies encompass him around, bent on destroying his reputation or his life. With no special plan in view he arms himself with swords and pistols, and accident or some unaccountable caprice finally determines his victim."

Winslow, in his masterly work on the brain, in speaking of such a patient, also says:

"All objects within the range of his perverted senses are tinctured and distorted by a disordered vision, jaundiced eye, and morbidly exalted and excited fancy. In this incipient phase of mental derangement he shakes with fear at the reflection of his image; crouches with apprehension at the reverberating sound of his own footsteps; trembles at the melancholy sighing of the wind through a neighboring copse; turns pale at the echo of his voice; falls back, aghast with horror, at the recognition of his shadow, mistaking it for a frightful phantom or grim spectral image,

"Fierce as ten furies; terrible as hell."

Yes; and as Mary Harris hurried with feverish haste along those streets which she first visited in order to be near him whom she was now to see no more, and mingled amid those scenes which only spoke to her heart of him, she beheld a mocking spectre forever at her side.

"She hears a voice we cannot hear,
Which says she must not stay;
She sees a hand we cannot see,
Which beckons her away."

This act, then, on which reliance is placed for a conviction—the purchase of the pistol—is shown to have been induced by one of those wild delusions which are absolutely conclusive of a disordered intellect. It is the culmination of the evidence which her conduct affords while she yet remained at Chicago.

But she came to Washington, stopping a few days at Baltimore. She thought Burroughs had blackened her reputation, and that the world had turned against her. She thought to have a lawyer sue him; and when the question of damages was suggested, she simply said she did not mean that; he was poor, and she did not want his money, but she wanted to vindicate her honor. Why, says the prosecution, this is the talk of a rational woman. Certainly, the light of reason at times blazed up almost as strongly as ever, though, for a poor girl without means, except what she borrowed of Miss Devlin, to travel a thousand miles to bring suit against a man, and then refuse his money, is, in itself, an evidence of unnatural excitement. But, let us meet this question here and now, and test it fairly by the rules of science. Let the inquiry embrace all that can be urged on this point against the defense. You say that she comes calmly into this court and does not rave in your presence. You say that, at certain times, when we catch a glimpse of her, she has exercised the attributes of reason. You have brought a number of witnesses here from a great distance to say that she was not mad in their unobservant presence. All this we admit and more. We not only admit, but we assert, that there are intervals during which she is perfectly sane on all subjects.

I again quote Ray:

"It is well known that many diseases, especially of the class called *nervous*, observe a law of periodicity which is not uncommon in the actions of the animal economy. One effect of this curious law con-

sists in an intermission of the outward manifestations of the disease, so complete as to bear the appearance of a perfect cure, and this, in the present state of our knowledge, is all that we can with certainty say of it."

"There are few cases of mania or melancholy," says Dr. Reid, "where the light of reason does not now and then shine out between the clouds. In fevers of the mind, as well as those of the body, there occur frequent intermissions. But the mere interruption of a disorder is not to be mistaken for its cure or its ultimate conclusion. * * * Madmen may show at starts more sense than ordinary men."

But I do not stop here. I leave the question of lucid intervals, and approach the periods of the insane paroxysms. Even then the reasoning powers are often acute and accurate, defying at times the most patient skill to detect any malady of the mind.

"The insane," says Esquirol, "group and arrange their ideas, carry on a reasonable conversation, defend their opinions with subtlety and even with a rigid severity of logic, give very rational explanations, and justify their actions by highly plausible motives."

Winslow also says:

"Whilst analyzing the incipient symptoms of insanity, as manifested during the stage of exaltation and excitement, it will not be irrelevant for me to consider an important subject closely connected with the matter under consideration, but, perhaps, more immediately bearing upon a medico-legal point of great interest to the jurist, as well as to the practical psychologist. I refer to the subtlety, quickness of apprehension, ready wit, biting sarcasm, great power of self-control, extreme cunning and extraordinary shrewdness of the insane, as well as the wonderful mastery they have occasionally been seen to exercise over their acknowledged delusions, whilst under the searching analysis of the ablest and most accomplished advocates of the day."

Of course, the prosecution here is compelled to fly in the face of all this, and insist that, in order that insanity may be proved to exist at all, it must appear so plainly that he who runs may read it, and that the wayfaring man, though a fool, may behold the fact at a single glance. We all remember the testimony of the renowned Erskine in regard to this question. He once examined a man in court with a view to the discovery of his mental alienation, and spent the entire day in propounding questions, to which the unfor-

tunate man, who was really insane, returned answers which were perfectly correct and rational. In this case which we are now trying, Dr. Young, a very excellent physician and a worthy gentleman, says that he several times visited the prisoner in jail, and prescribed for her; that his attention was in no wise called to her mental condition, and that he did not discover any evidences of insanity. This seems conclusive to the minds of the gentlemen who represent the Government; but in the light of scientific truth it is nothing: it vanishes as an imperceptible mote in the atmosphere. What strange delusions haunt the popular mind on this subject! We forget that the mind is a many-stringed instrument, and that, while it requires every cord in a healthful state to create a perfect harmony, yet one may be strained and broken, and still the others when touched give forth their own unimpaired tones. It is matter of history that "Tasso composed his most eloquent and impassioned verses during paroxysms of insanity. Lucretius wrote his immortal poem, *De Rerum Natura*, when suffering from an attack of mental aberration. Alexander Cruden compiled his Concordance whilst insane. Some of the ablest articles in Aikin's Biography were written by a patient in a lunatic asylum." Sublime inventions have likewise sprung from the labors of disordered intellects, and exquisite statuary has stood up at their bidding. But in these most painful instances there was somewhere a hidden wound which would not heal, which bled at the touch. When it gaped afresh the whole instrument wailed forth in melancholy madness, and the stricken beings were irresponsible for their acts in the sight of God and man.

And now, gentlemen, as we approach the final and tragical scene where the disasters of this girl's life culminated in the death of Burroughs, let us pause a moment at Baltimore. Mrs. Fleming was called for the Government, and yet all will admit that her evidence powerfully supports the defense. We see the defendant fitful, nervous, and wavering; as the witness says, not natural. At times she sinks in long

and gloomy spells of abstracted silence. She gazes steadily on space and distance, all unconscious of surrounding objects. She breaks suddenly from these dismal reveries, sometimes in a ghostly and exalted glee.

"Moody madness,
Laughing loud, amidst severest woe."

At other times she starts up singing in plaintive strains, the broken fragments of some melancholy song, which tells of disappointed love. When the witness heard her murmuring "I loved him, but he doubted me," she heard the universal wail of woman's broken heart and wandering mind. And as the hour drew nigh for her departure to Washington, she spends a sleepless night poring over these fond letters of the deceased. The midnight is not more gloomy than her soul. She is communing with the lost—the lost hopes of other and brighter days—the lost hours of a radiant joy—the lost hours of love, of happiness, and promise. She is amidst the tombs, and the demon, memory, absorbs and binds her captive. She takes no note of time. The witness calls her and finds her still buried in her thoughts. She starts in a hurry with a return ticket in order to go back to Baltimore that evening. Thus this lovely being came here, and in this mood of mind she went to the Treasury building. No wonder when she first reached there that the lady, whom the prosecution introduced, noticed a light in her eyes which alarmed her.

Up to this point, where are the indications or expressions of malice toward the deceased? Where is the evidence that she premeditated murder? The pistol itself is scarcely calculated to take life, and it has been shown that she obtained it under the influence of an insane delusion. She inquired for Burroughs; she wanted to see him. Was this with a desire to kill? In the instant that he fell by her hand she implored God on her knees to spare him. Does the murderer beseech Divinity to spare his victim? She offered her life for his if he could be saved. Is this the conduct of one who lies in wait and assassinates in cold blood?

As his life was ebbing away, she shrieked "Oh! God, I loved him better than my own soul." Is this the language of one who, in the exercise of reason, has smitten to death an object of hate and revenge? Recall that awful scene which was delineated before you by the Hon. Secretary of the Treasury, the force and terror of which even he declared, he could not properly describe. The rigid features, the white and ghastly face, the blazing and tearless eye, the rapid, and at times, incoherent speech, imprinted upon his mind for the first time in his life, the dreadful reality of absolute despair. He rendered a verdict in favor of her innocence, when, with the instincts of the kind gentleman, he took Mrs. McCullough the next morning to visit her in prison. He had witnessed her state and condition, and judged the case correctly. There was neither premeditation, malice, nor design. She was incapable of either. It was the insane paroxysm to which we have already seen her subjected. We have the medical testimony which I shall directly apply, but I will first support my position from the books.

Fodoré, as quoted by Ray, uses this striking language:

"The mania, which is accompanied by fury, is very often periodical; that is as if granting an occasional truce to the patient, it appears only at certain epochs, between which he enjoys all his reason, and seems to conduct and judge in all respects, like other men, *if we except in regard to certain ideas the thought of which may, at any time, occasion a fresh paroxysm.*"

Who ever possessed a more painful train of ideas than Mary Harris; and if the mere thought of them might, at any moment, unsettle her reason, how shall we describe the effect of the actual presence of Burroughs? For a year and more the memory of her wrongs at his hands had pressed like a hot iron on her brain, her health was broken, she was pursued by a delusion, and shook like an aspen in the wind; her nights were bereft of repose, and to her perturbed spirit day brought no rest or cheering. And thus the feverish, drifting wreck of her former self, she met him. Mental philosophers have declared the result. It is at such a time

that the beautiful language of his Honor's charge is applicable. Phrenzy mounts up by the side of reason, seizes it, and for the time being takes it prisoner:

Dr. Combe, one of the ablest thinkers on this subject, also says:

"But, however, calm and rational the patient may appear to be, during the lucid intervals, as they are called, and while enjoying the quietude of domestic society, or the limited range of a well regulated asylum, it must never be supposed that he is in as perfect possession of his senses as if he had never been ill. In ordinary circumstances and under ordinary excitement, his perceptions may be accurate and his judgment perfectly sound; but *a degree of irritability of brain remains behind, which renders him unable to withstand any unusual emotion, any sudden provocation, or any unexpected and pressing emergency.*"

We only claim for this unfortunate defendant the demonstrations of science. We only ask that what universal experience has found true of others may be fond true of her. She was very frail in mind and body, and "unable to withstand any unusual emotion, any sudden provocation, or any unexpected and pressing emergency." There was a "cause that hurt her brain," and the appearance of the deceased revived it in all its bitterness and power. The flash of the lightning is not more instantaneous and irresistible than was the awful impulse which followed. It may have been the swift avenging stroke of Nemesis. He may have beheld the spirit of retribution as he took that last, fearful glance at her unearthly face; but no attribute of reason guided her blow. It was the rebound of his own acts, which were conceived in guilt, but which now returned in madness to torment the inventor. He had laid for her a frightful train of ideas, all connected with himself. His presence applied the match, and the explosion hurled him into eternity.

But thus far, gentlemen of the jury, I have dwelt in my own feeble way upon the condition, language, and conduct of the prisoner, and the application of standard works of science, in order to reach the conclusion which is maintained by the defense. I now, however, take one further and higher step, and plant myself on sworn facts, which you cannot

disregard, except in violation of your oaths as jurors. We placed upon the stand a gentleman of eminent distinction as a physician of the diseased mind. Dr. Nichols has pursued this branch of science as a specialty for over twenty-five years, and has been the Superintendent of the Asylum for the Insane in this District for the past eighteen years. His reputation is known extensively throughout the country, and I may be permitted to say that he has deeply impressed me as a gentleman of profound intellect, a vigorous and correct thinker, and a most conscientious laborer in the vineyard of truth. Life, honor, and justice are all safe in his hands. He comes before you and relieves this case of every difficulty. He lifts a weighty responsibility from your shoulders, and makes your duties light and easy to be discharged. First, he has heard, and had submitted to him for inspection, every word of testimony in this cause to which you yourselves have listened. Secondly, he has visited the defendant in prison as often as he conceived necessary, to enable him to form a correct opinion of her condition. His means of information, therefore, embrace every source. He meets fully and completely the requirements of medical jurisprudence as an expert. No man ever stood up in a court of justice more amply qualified to give an opinion. And in view of this girl's history and early life, in view of the mental afflictions which overwhelmed her, in view of the physical disease which preyed upon her system, and in view of all the facts which her unhappy case presents to his analytical, discriminating, and scientific mind, he declares to you, as the result of his careful deliberations, that she has suffered from paroxysms of insanity, and that the act of homicide on the 30th of January arose from an insane impulse, and not from motives of hate or revenge—in his own language, “that this theory is more in harmony with the truth than the other.”

Here, then, is the whole defense established by the highest evidence known to the law. The opinion of an expert is *a fact in the case*. No other witness can give any opinion

at all. Dr. Nichols, therefore, proves as *a fact* that, from moral and physical causes combined, the defendant has labored under paroxysmal insanity, and that the act for which she is now on trial was committed during a paroxysm, and under an insane impulse. You have no legal right to find a verdict contrary to the testimony of Dr. Nichols, unless he is unworthy of belief, or has been successfully contradicted by other competent witnesses, whose opinions are entitled to greater weight than you attach to his. On this proposition I rest securely. And on the uncontradicted statement of this scientific witness I risk the life of the prisoner. He is the Saint Peter of my faith, and on this rock I build the defense; and neither the power of the public prosecution nor the gates of private malice shall prevail against it.

But we are met at this point with a proposition by the prosecution which I undertake to say is without a parallel in the courts of any country which has been blessed with the light of civilization. Utterly borne down and crushed by the evidence of Dr. Nichols, the gentlemen who represent the Government boldly and without a blush declare that the opinions of men who, like him, have given their lives to the study of the mind in all its various and mysterious phases, are less reliable in the discovery of insanity than the opinions of those who have bestowed no particular attention on this great and difficult subject. The cry of "mad doctors" has been raised, and we heard an appeal against them in favor of what were styled "common sense doctors." Gentlemen, I feel humiliated that I have listened to such language from such a source. Is there such an unappeasable rage to take the poor life of this prisoner that in order to do it these distinguished gentlemen are willing to resort to the lowest and most pernicious arts of the profession? Do they propose to deride the disciples of learning, the devotees of science? Will they stand up here in the noonday of human progress and enter the lists as the avowed champions of ignorance? Who are the "mad doctors" of the world at

whom this persistent and systematic sneer is levelled? They are those who have made the subject of insanity a specialty, who have given their days and nights to incessant and laborious thought, who have struggled with painful toil to alleviate the direst woes of their fellow men, to cure those wounds which the lash of misfortune inflicts, and to pluck from the diseased mind its rooted sorrows. And is it found necessary to stamp such characters with odium in order to convict Mary Harris? Shall we pluck from the scientific heavens their brightest and boldest luminaries, and accept darkness, gloom, and mist again? Shall we strike down that blazing galaxy of genius, toil, and progress, where the names of Winslow, Esquirol, Ray, Gall, Spurzheim, Rush, Combe, Prichard, Ellis, Hoffbauer, with others of the shining host, are burning as stars on the front of the sky; and into whose glorious companionship we anticipate but a few years by introducing now the name of Dr. Nichols himself? These are they against whom the prosecutors invoke the aid of ignorance and prejudice. They have certainly mistaken the age in which they live. The District Attorney is nearly two centuries in the rear of the still advancing column of human improvements. There was a period in the world's history when this assault on men of science would have relaxed the dull features of stupidity into a smile and caused blind superstition to nod its ugly head with approval. There was a time when darkness rested upon the face of the waters in the scientific world, when the voice of learning had not yet brought order out of chaos, when courts of justice were nurseries of bigotry, when mental derangement was judicially interpreted as the possession of a demon, and the sufferer declared to be in familiar communion with the Prince of Evil. At such a time as this the District Attorney could have charged upon "mad doctors" amidst acclamations. Could he have found an enlightened man of science during such a period he could doubtless have had him hung as a sorcerer or magician, along with the party whom he declared to be insane. And even now, today, wherever there is a cavern in which the owls and bats of

ignorance, superstition, and gangrened prejudice yet inhabit, where the rays of liberal enlightenment have not yet penetrated, and where no beautiful thing has ever grown as a sign of progress, there his voice, going forth from this court-room, in denunciation of the growth, the achievements, the accumulated treasures of ages, will be hailed as if clothed with the authority of a heathen oracle in the days of heathen supremacy. Yes, in order to ask for a conviction at your hands, he is compelled to repudiate the products of civilization, recede into the darkness of the past, and from the gloomy fortresses of barbarism shower his missiles on the head of this most unfortunate being. When Paul explained the mysteries of the redemption, the barbarian official of Rome cried out—"much learning hath made thee mad." Dr. Nichols pours a flood of light upon the issue before this court, and the law officer of the Government says: "Thou art a mad doctor." It is no part of my purpose to give offense, but in the name of bright-eyed truth, in the name of immortal science, in the name of the high, advanced banners of civilization, in the name of the stalwart, conquering spirit of gigantic progress, in the name of the greatest benefactors of suffering and diseased humanity, in the name of the liberal, humane, and learned profession of which I am an humble member, and in the name of an American court of justice, I protest against this attempt to break down and trample under foot the wisdom, the experience, and the labor of ages, and to destroy, by an unworthy appeal to the basest prejudices of mankind, those safeguards which the proudest intellects of the earth have erected around such victims of misfortune as this young prisoner.

But let us see how the prosecution, after all, has fared in the issue which it attempted to make between Dr. Nichols and those members of the medical profession who have been introduced as witnesses, under the novel title of "common-sense doctors." Upon a presentation of the case, detailing the evidence with wonderful fidelity and accuracy, every

physician, without a single exception, who was placed upon the stand by the Government, concurred instantly and unreservedly with Dr. Nichols. Dr. May, Dr. Miller, Dr. Johnson, Dr. Howard—all very eminent, and of long experience in their profession, standing in the very front ranks—swear without hesitation that, in their opinions, the defendant was subject to paroxysmal insanity, and that the presence of Burroughs developed a maniacal impulse, over which she had no control, and before which he fell. Will it be said that Mr. Bradley did not submit a fair statement of facts to these medical gentlemen? You shall judge of that. Would he fabricate a case on which to obtain their opinions? The District Attorney and Mr. Wilson certainly do not mean such an imputation. Can a man at his time in life, at the head of his profession, eminent in it before some of us were born, beloved and respected by all; can he afford to attempt to practice a fraud upon you in your presence, when you have all the means of detecting it? No. He submitted the whole case, including his own accurate and most intelligent observations of her wretched condition in prison—a recital so vivid and eloquent in its faithful simplicity that thoughts of it swell the heart with emotion, and banish from our minds all idea of guilt in the conduct of the prisoner.

Let us, then, sum up the result of the medical testimony. Five eminent physicians, with Dr. Nichols at their head, in this branch of their profession, establish the irresponsibility of the defendant. Four of them were called by the Government to establish the contrary. Not one has given it as his opinion that she was sane at the time of the homicide. There is absolutely no conflict of evidence on the point, and hence we hold that we have brought ourselves within the ruling of the Court. The Court has charged you that the burden of this issue is upon us; that it is not enough for us to raise a doubt in your minds whether she was sane or not, but that we must establish her insanity by the weight of evidence, and beyond a reasonable doubt. Favorable as this construction of the law is to the prosecution, yet it can

avail nothing in behalf of a conviction, for not merely the weight of the evidence, but all, every particle of the evidence touching the question of insanity, is with the defense. The prosecution stands destitute and naked, without a shadow of support. I challenge the records of the courts of this or any other country to show a more perfect and conclusive defense, or a more powerless and utterly defeated prosecution. We hear much said in regard to the defense of insanity. Many speak of it as a plea manufactured by counsel. It is, however, in one vital respect, like all others—it must be supported by proof or it falls to the ground. Have we manufactured the positive and direct testimony of every medical witness introduced on both sides? Is this our handiwork? I submit to you and to the candid judgment of the country, that if Mary Harris can be convicted under this evidence, if Dr. Nichols can be broken down in this Court, not by contradiction, but by declamatory appeals to prejudice, and if, finally, the unbroken chain of scientific testimony can be put aside as naught, then the great and settled principles of medical jurisprudence are a delusion and a snare, and the infirmities of the intellect occasioned by misfortune constitute no defense for violent and irrational conduct.

And why, without one solitary witness to support their theory of the case, do the prosecutors so hunger and thirst for the conviction of this most desolate and bereaved of sorrowing mortals? Why do they clamor so fiercely against the barriers of the law and of the evidence which encompass her about, in order to drag that sick and fragile body to a miserable death? Is it punishment they seek? She has suffered more already than the king of terrors in his most frightful form can inflict. If she had been broken on the wheel, her limbs disjointed, and her flesh torn in piecemeal by the most fiendish skill of the executioner, her tortures would have been merciful compared to the racking which sunders into fragments the immortal mind. There is no arrow in death's full quiver that can give this young breast a new sensation of agony. She has sounded all the depths

and shoals of misery and pain. She has lived in

"A whirling gulf of phantasy and flame."

Restore her by your verdict to the soothing influence of friends, of home. Let her go and lay her aching head on the maternal bosom of that Church which for eighteen centuries has tenderly ministered to her children in distress. Let her go and seek, in the love and mercy of the Father of us all, consolation for the cruelty and inhumanity of man.

But it is claimed that a conviction must be had for the sake of example. You have been told that the people of the District of Columbia demand it. I would not bring such an argument into Court, but when here I will meet it. If it be true that you desire examples for the correction of vice and the preservation of morality, I pray you not to commence with the humblest, the feeblest, and the most helpless. But I deny that the condemnation of the defendant is demanded by the people of this capital. Who are they who ask her blood at your hands? I know this people, and to some extent I think I may speak for them. I have been the recipient of their constant kindness while in their midst, and as a representative in Congress I have, in return, dealt with them in a spirit of liberality whenever I have known their wishes. You were told that the defendant came here from a distance—that the States were pouring their criminals in upon you, and therefore she must suffer as a warning to others. Such a statement is unjust to your people. You want justice, and justice alone, administered upon all: and who believes that this girl's life is required as an offering upon the altar of public justice? I repel this imputation upon the intelligence and humanity of this kind and hospitable District. When you are discharged from your protracted confinement and return to your homes, as you will in a few hours, ask those whom you meet there, whether they desired you to cut the feeble thread of this girl's life by your verdict. I will abide by their answer. To no one has she appeared as the criminal, save to those who conduct and inspire the prosecution. To all others in your midst she has

presented the sad spectacle of calamity and misery. Her purity, her gentleness, her guileless truth, shining out in every word and act, have won to her side in this dark hour your oldest, your best, and most honored citizens. Her prison abode has been brightened by the presence of the noblest and purest of her own sex, and delicate flowers from the loftiest station in the world have mingled their odors with the breath of her captivity.¹⁰ Men venerable in years, and strong in their convictions of the principles of immutable right, have been drawn to her assistance by an instinctive obedience to the voice of God, commanding them to succor the weak, lift up the fallen, and alleviate the distress of innocence. And now for Mary Harris, and in the name of Him who showered his blessing on the merciful, who spoke the parable of the Samaritan, who gave the promise to those who feed and clothe the stranger in their gates, and who visit the sick and them that are in prison, I thank the people of the capital. Add one more obligation for her to remember until the grave opens to hide her from the world. It is in your hands to grant. The law in its grave majesty approves the act. The evidence with an unbroken voice demands it. Your own hearts press forward to the discharge of a most gracious duty. The hour is almost at hand for its performance. Unlock the door of her prison, and bid her bathe her throbbing brow once more in the healing air of liberty. Let your verdict be the champion of law, of morality, of science. Let it vindicate civilization and humanity, justice and mercy.

Appealing to the Searcher of all hearts, to that omnipresent eye which beholds every secret thought, for the integrity of my motives in the conduct of this cause, and for the sincerity of my belief in the principles which I have announced, I now, with unwavering confidence in the triumph of innocence, surrender all into your hands.

Mr. Carrington: Gentlemen of the jury, you see before

¹⁰ Mr. Voorhees here alludes to a bouquet sent to the prisoner by Mrs. Lincoln, the center flower of which signified "Trust in me."

you on trial a woman. It is a case somewhat unprecedented in the history of this tribunal. I plead the cause of woman. Go to yonder churchyard. See that mother weeping over the honored grave of her only boy. He has fallen in his country's cause. Who is she? Nobody, in comparison with Mary Harris, the heroine of the day. See that wife diffusing life, light, joy, and hope around the family circle—the idol of a husband's heart and the guardian angel of her children. Her little curly-headed girl is kneeling by her side, and repeating her evening or morning prayer. Rise from your knees, my pretty child; you are wrong. When your little heart is wrung, don't go, as your hymn-book says, and tell Jesus. Arm yourself with a deadly weapon, and avenge your own wrongs with the red hand of violence and of crime. Mary Harris, the model of female excellence, held up before the public for the admiration and imitation of our mothers, wives, and daughters, has said that the ladies of Chicago carry deadly weapons and avenge private wrongs, whether real or imaginary, by private means, and we intend to introduce this fashion into the city of Washington. Permit me here to say, that if the voice of woman could be heard—gentle, lovely, virtuous woman—she would denounce this slander of Mary Harris and the Devlins as an insult to every honest and virtuous lady in the land. I yield to no living man in admiration for true female character. I have known the inexpressible tenderness of a wife's, a sister's, and a mother's love. You all have. We each have seen the noblest exhibition of true female character during the unhappy strife which has existed in our country for the last four years. Did you ever go to yonder hospital? See that young man. He is pale, attenuated, and emaciated. He has received some terrible wound, while fighting in his country's cause. He is far away from family and friends. The agents of the Government are doing all that humanity and duty can suggest for his comfort and relief, but he is not satisfied. No kind mother stands by his bedside to cool the fevered brow. But hark! He hears woman's gentle voice, perhaps one which he has never heard before, but it is wom-

an's voice. It falls upon his ear like the name of home in some distant land, or rain-drops in a thirsty desert. She administers to his wants, and whispers words of comfort and of consolation. He revives; he shoulders his musket and strikes another blow for his Government and his flag. Perhaps his last hour has come. Ever faithful, gentle woman, points him to a Saviour's dying love; and as the world recedes from his view, like a true and valiant soldier of the cross, he triumphs over death and the grave. When the noble daughters of America were kneeling by the bedside of the dying soldier, where was Marry Harris? That was a time when an appeal was made to every woman who had a heart to love her country and her race. Where then was Mary Harris, the model of female excellence? Arming herself with this instrument of death, practicing the use of deadly weapons, going in company with one of the Devlins to Quincy street to a house of assignation without a protector, and at last imbruing her hands in the blood of one who had drawn his sword in his country's cause; and you are called upon to approve, justify, and applaud this cruel and bloody deed. Are we Christians? Do we live in a Christian age, a Christian community, and do we worship the Prince of Peace as the only true and living God? Gentlemen of the jury, have you considered the awful responsibility that rests upon you? I have, and I pray that God may give me grace to discharge my duty.

Behold, here, ladies, gentlemen, and little boys and girls. You are educating public sentiment. The judge upon the bench, the district attorney, and the jurors, should not only be men of common sense and of sterling integrity, but of the purest morality. Will you by your verdict say to these little boys and girls, that a woman who arms herself with a deadly weapon, and imbrues her hands in her brother's blood, and commits murder in vindication of female virtue which has never been injured, is a model for their imitation? *O tempora! O mores!* I appeal to an honest jury of my country, (and the responsibility rests upon you), to

beware how they record a verdict so hostile to the cause of justice and religion, and which will be borne by the telegraphic wires to all sections of the country, and which will be read by the present and succeeding generations. Oh, gentlemen of the jury, let us rebuke this spirit, and vindicate the sacred cause of religion and of law.

Appeals have been made to your sympathies; and that is all, as I will show. Sympathy! sympathy! sympathy! and nothing else, and with unusual zeal and eloquence. Good Heaven! Behold what an array of counsel. In Joseph H. Bradley you behold the Ajax Telemon of the defense. In my friend, William Y. Fendall, you behold the young, the ardent, the amorous Tydides, not casting his javelin at the goddess of love as she flies through the air on her way to heaven, but, with his armor off, kneeling at her feet. In Judge Mason you behold the sweetly speaking Nestor of the Grecian camp. In Judge Hughes the wise, the prudent, the cautious Ulysses. In the Hon. Daniel W. Voorhees you behold the fierce, implacable, irresistible Achilles, and even old Agamemnon (pointing to the judge on the bench) himself, can never look at the gentle sufferer without a sigh expressive of his sympathy; and there sits the lovely Helen, bathed in tears, surrounded by her female attendants, urging on these sturdy warriors to deeds of superhuman valor. Here I stand, aided only by my efficient and accomplished assistant.

Gentlemen of the jury, am I not an object of commiseration? I saw some of you crying, but I think you cried in the wrong place. Were you concerned for me? No! no! gentlemen, don't be alarmed. Courage, gentlemen! I stand clothed in celestial armor, behind the broad ægis of the law, and their javelins fall harmless at my feet. I hold up the law, and thus I roll back the tide of sympathy that has been pouring into the jury box. I remind you of your solemn oaths, and then you dry your tears, and nerve yourselves to the discharge of your stern and solemn duty.

Now, gentlemen, as my friend, Mr. Wilson, said, what

do we care for Mary Harris? So far as she is concerned, you may put her in a bandbox and send her home—not to the Devlins, however—God forbid!—but to her father; and I will tell you, before taking my seat, how it can be done without doing violence to any man's conscience.

It is the principle, the great principle for which I contend, that the majesty of the law must and shall be vindicated. I said in my opening address, gentlemen of the jury, and I now repeat, that we must be cruel only to be kind. We must punish the guilty to protect the innocent. Obedience to law is the safeguard of us all. Loyalty to law and government is obedience to God. Crime must be punished, because God commands it. You are the ministers of his justice upon earth. Having made these remarks, gentlemen, I assume that you will hear the argument which I intend to present to you; and I undertake to say, if there is any little boy or girl here who will give me his or her attention, I will satisfy him or her that this jury are bound to convict the prisoner at the bar, unless they close their eyes to the evidence, and disregard the opinions of the doctors, and trample under foot the law as enunciated by the Court. If you wish to shield yourselves behind the opinions of the doctors I have no objection; but I have no idea that a doctor shall swear to one state of facts, and see an honest and intelligent jury of my country make themselves ridiculous before the whole world by swearing to a different state of facts, or rendering a verdict inconsistent with the opinion expressed by these scientific gentlemen, who have perhaps said enough to mislead the jury, if what they have stated be not properly explained by the law officer of the Government. They were themselves exceedingly cautious not to commit the blunder which you are invited to perpetuate upon the records of this court. What doctor has sworn that this woman was so insane at the time the homicide was committed as to render her irresponsible in law for her conduct? None. None of them would dare to do it. He could not do it, in my judgment, without com-

mitting the crime of perjury, and I will prove it. If this jury acquit this woman upon the ground of insanity, you swear to a fact, and you perpetuate upon the records of this court a fact, which will not only make you ridiculous, but which is utterly inconsistent not only with the evidence, but with the opinion of every physician who has been examined within your hearing. But permit me, gentlemen of the jury, to proceed more logically to consider the case at bar.

There are four questions, gentlemen of the jury, as I stated to you in my opening address: 1st. Was the homicide charged in the indictment committed within the jurisdiction of this court? 2d. Was it committed by the prisoner at the bar? 3d. If it was, is it a case of excusable homicide, upon the ground of insanity, or for any other reason? 4th. If not excusable homicide, is it murder or is it manslaughter?

I will consider the first two propositions, gentlemen of the jury, together; and in doing so I have only briefly to recapitulate the evidence.

Gentlemen of the jury, the curtain rises. The scene is laid at a boarding-house in the city of Chicago. The heroine of the bloody tragedy makes her appearance—a good, sprightly, black-haired girl. She was without either father or mother at that time. It is then she forms the acquaintance of Louisa Devlin, another beautiful, charming, and accomplished lady. Louisa Devlin invites her to go to her millinery establishment. Prompted by an “insane impulse” she accepts the invitation. What sort of a millinery establishment was it? I wanted to find out, and in the most courteous and respectful manner, for no one is more courteous to a lady than myself, I asked her how many young ladies she had in her employment. She threw herself back on her dignity and said, “That is my business, and none of yours.” There is Mary Harris, in a millinery establishment, the character of which the proprietress is ashamed to describe.

Mr. Hughes: May it please your Honor, I dislike to interrupt counsel, but there is no evidence whatever as to the character of Miss Devlin's house.

THE COURT: A counsel in the closing argument, knowing that there is no one to come after him, ought to studiously keep himself within the prescribed limits, unless he wants to be interrupted at every stage. He ought not to pervert or misstate the evidence.

The District Attorney: Gentlemen, after the attack which has been made upon Dr. Burroughs—

THE COURT: You shall not retaliate upon Miss Devlin for an attack upon Dr. Burroughs. You must confine yourself to the legitimate application of your remarks to the evidence of the Misses Devlin. It is an abuse of your position to make such an attack as that upon such grounds.

The District Attorney: You will bear in mind, gentlemen of the jury, that I did not interrupt the learned counsel. You heard the attack upon Dr. Burroughs of which I shall have something to say hereafter. You know I must not dare to lay my fingers on the Misses Devlin.

THE COURT: The Court did not say so. I will not permit you to misrepresent the Court or the witnesses. The Court has given you express permission to comment upon all the evidence given by the Misses Devlin and compare it with itself and the other evidence in the case and sift it to your heart's content; but upon the mere refusal of one of those ladies to tell you how many clerks she had in her place of business, the Court will not permit you to launch out in the great latitude of inference you were going upon.

The District Attorney: I will say that I do not think that any witness contradicted Dr. Burroughs. They justify their attack upon him from inferences drawn from what he said. I thought I had the same privilege, but I bow with due deference to the decision of the Court.

THE COURT: You shall not go on in that way. The Court will not permit a controversy between you and it to be decided by this jury. You shall not utter another syllable on that subject. I will put you in the hands of the Marshal if you do.

Mr. Carrington: Again I say, and I will endeavor to argue under the instructions of the Court.

THE COURT: Well, proceed.

The District Attorney: I will proceed.

THE COURT: In order.

The District Attorney: I was about to argue as to the inference to be drawn from the testimony of the woman Devlin, her manner, and her answer to the question which I put, which I thought was competent, but I understand his Honor to say I was wrong in that opinion.

Mr. Carrington: Gentlemen of the jury: Before proceeding to discuss the question of insanity, I shall be par-

doned, I trust, for saying a few words in reference to the brother of the deceased. Permit me, gentlemen, to ask you one question: Suppose that one of our ministers—such a man, for instance, as Dr. Gurley, Dr. Samson, Dr. Gillette, or Father Maguire, men to whom we have been in the habit of looking up, not only as our spiritual fathers, but as our teachers and exemplars—should go to Chicago as a witness, and a woman, who admitted she had been to an assignation house without a protector, no matter for what purpose, should be put upon the stand to assail the reputation of such minister for veracity—what would you think of it? You know, and we all know, what would be your opinion. Now, the Rev. John C. Burroughs stands in Chicago just as either of these eminent gentlemen to whom I referred stands in Washington.

They seem to think there is a strong prejudice against the whole Burroughs family, judging from what Mr. Voorhees said of the popular clamor and the feeling in the community against Dr. Burroughs, and from what Judge Hughes said on the same subject. I think they are mistaken. If this jury have any prejudice, which I do not believe, but if you have, I will simply say that you have sworn to decide the case without *prejudice*; and I intend to show you that you cannot discredit Dr. Burroughs without branding one of the best men in the community with the crime of perjury, and falsifying the record of the Treasury Department. Who is John C. Burroughs? He has told you that he is president of the University at Chicago. Well, I am one of those men who do not believe that the office makes the man, but that the man makes the office. I admit that there are hypocrites, wolves in sheep's clothing; but it is not so in this case. It may not be amiss here to say, among other things, in order to show you the character and position of Dr. J. C. Burroughs, that he was, during the life of the distinguished orator and statesman, Stephen A. Douglas, one of his most honored and trusted friends, and the remains of that illustrious man now rest within the

inclosure of the university over which he presides.

He has, too, been the friend and co-laborer of our fellow-townsmen, Dr. Samson and Dr. Gillette, and is therefore entitled to your respect and confidence. If what I now say could be heard in Chicago, the good people there would say, is it possible that Mr. Carrington has deemed it necessary to pass an eulogium upon Dr. Burroughs? It is a presumption. It is not necessary to defend him against such attacks, even when made by Judge Hughes and the Hon. Daniel W. Voorhees.

Now, what has this estimable man, who holds a commission from our Saviour, which he has never dishonored, done to induce these unjust assaults? Why, gentlemen, the head and front of his offending consists in his offering to advance money to certain witnesses, that they might thus be enabled to come here and vindicate by their sworn testimony the character of his murdered brother, a soldier and a public servant, who died at the post of duty by the assassin's hand, without a stain upon his honor. Is Dr. Burroughs to be condemned for this noble, generous, and manly act? Had he not consented to do it, he could not have been regarded otherwise than as the wretch he is represented to be. Had he offered to pay a witness to swear falsely, he would have been guilty of subornation of perjury; and I, in that case, would have been as prompt and vehement in his denunciation as any one could be, and would instantly tell you his testimony was entitled to no weight at your hands. But every honest man, instead of censuring, must commend the noble zeal he has displayed in his efforts to remove the stigma which is sought to be cast upon his dead brother's character and name. They say that he is contradicted. In what respect? In regard to his brother being in Washington at the time these "Greenwood" letters were written and mailed; that he has testified falsely in regard to these letters. All I have to say is, that if he has, so also has Danenhower, one of the most intelligent and estimable gentlemen in this community.

The records of the Treasury Department are false if the testimony of these gentlemen be false. Danenhower swears, and those records confirm his statement, that A. J. Burroughs was in the city of Washington on the 10th of September, and these letters are dated on the 8th and 12th of September, and dropped in the post office at Chicago. From these facts it is conclusive that Dr. Burroughs has testified truthfully upon the point.

Again, gentlemen of the jury, he is charged with endeavoring to keep away a witness—one Ellen Mills—desired by the defense. Is that so? What is the evidence on that point? The evidence is, that Dr. Burroughs inquired of the officer whether this woman could be summoned, or could be relied upon. The officer replied that she was a woman of bad character, and would not appear as a witness unless she was paid; whereupon Burroughs, like an honest man, declined to summon her. He, supposing her testimony to be important in the case, wanted to summon her for the United States; but, hearing she was a corrupt woman, refused to have anything to say or do with her. It is said by the gentlemen that they wanted her here, and that her testimony was very material to the case. Why didn't they summon her? They had the right, and could have got her here. Or, if they did not want to bring her here, why did they not have her deposition taken—a privilege, strange as it may seem, granted to them by act of Congress, but not granted to us in criminal cases.

Again, they say they did not like this manner. Did you ever, gentlemen, observe a more solemn and impressive scene? There sat the murderess; near her were her friends and companions. There stood the witness; his heart wrung with anguish, for his only brother had been murdered; the natural protector of his widow and his orphan child. Here, by the table, sat the ablest counsel in the country, eager to catch at every word he uttered, for the purpose of assailing his testimony. Is not that exactly as I have stated it? Dr. Burroughs consults the officers as to whether he shall

summon this woman or not. He discovers that she is a corrupt woman, and, like an honest man, he declines to have anything to do with her. But they say, gentlemen, that this minister of the Gospel is to be censured, because he did not read a lecture to the detective and this prostitute, Ellen Mills. What does the Bible tell us to do in such cases? "Not to cast pearls before swine." Dr. Burroughs observed the Divine injunction. That seems to be his only fault.

I am aware that there are some persons who have a prejudice to ministers of the Gospel, and are glad of an opportunity to assail them. And there are some persons, also, who have a prejudice to members of Congress. I will put a "hypothetical" case.

Upon one occasion I put an old gentleman upon the stand to prove the bad character of a witness. He testified that he was a person of very bad character. What did you ever know or hear of him doing wrong? Nothing in particular; but I have seen him, day after day, and night after night, associating with members of Congress and other loose characters.

Now, this is very improper. I like members of Congress just as well as other people, when they behave themselves. I have no prejudice against any class of my fellow-citizens. You know my sentiments on this subject. I have for years been warring against sectional feeling and prejudice of every kind.

But, gentlemen, I understand the object of the assault, and I think you must perceive it. These gentlemen know they cannot injure Dr. Burroughs in the estimation of the public, or in your estimation, but they desire to divert me from the prosecution of Mary Harris to his defense; to divert your attention from the murderess to the brother of the deceased; but I am too old a warhorse to be caught in that way. What is the rule of law, gentlemen, on this point? There are three ways of contradicting a witness. First, by assailing his reputation for veracity; and why didn't they attempt that? They dared not do it, for the reason that

he stood too high. He told them who he was—where he could be found; and yet not a witness, male or female, with the host of friends that this beautiful murderess has, could be found to assail his reputation for veracity. The second mode of contradicting a witness is by showing that he has made different statements at different times in regard to the same transaction. Was not the statement of Dr. Burroughs clear, consistent, honest? He would say now what he said yesterday, or would say tomorrow. The third mode is by proving a different state of facts by another witness. What witness contradicted him?

The District Attorney: Yes, Louisa Devlin! And how does she contradict him? Why, in regard to an immaterial fact; and—you will, your Honor, pardon me, for I do not wish to go against the instructions of the Court—is John C. Burroughs, the honest, Christian gentleman, to be denounced in court, and is my mouth to be sealed when they rely upon the testimony of this Louisa Devlin? Who is Louisa Devlin? When asked about her business, her color would come and go. By her own admission, she went to an assignation-house on Quincy street on a fool's errand.

Mr. Carrington: I wonder if any man ever called her *ducky*, his darling, his rosebud, or his sugar plum? Do you suppose it would have given her paroxysmal insanity? I have no doubt it would have excited her very much, for, judging from her looks, she ain't used to it. And this is the woman upon whom they rely to contradict the honest, Christian gentleman! She is indeed the Iago in this bloody tragedy; for Mr. Bradley told you, in his opening address, that this was the old story of Othello. It was hatred and jealousy that urged Mary Harris to the commission of this atrocious murder; for you remember she told her lawyer that her love had turned to hatred. And, gentlemen of the jury, it was the desire of money that prompted Louisa Devlin to fire the jealousy of this love-sick girl, preparatory to a suit for a breach of promise of marriage, expecting to share the damages, and I will prove it from the evidence before taking my seat; for, notwithstanding the eulogium pronounced upon her, I say that she is a woman without delicacy, with-

out refinement, and without sensibility, for during this trial she has sat here giggling while her friend was on trial for her life, as though she were on a debauch in Quincy street, Chicago, at the house of Ellen Mills.

Mr. Bradley: Your Honor, I denounce such an accusation in the strongest terms that man can. There has not been one word of reproach cast upon Miss Devlin from the beginning to the end of this trial, and I do say that no gentleman would use such language towards a woman.

The District Attorney: I shall not be betrayed into any indiscretion, if the object is to insult me. I have only discharged my duty as in my humble judgment seemed proper. I make the same remark in regard to the attack upon Dr. Burroughs.

Mr. Bradley: I say the man who denounces this woman without the evidence in the case warranting it trespasses beyond the license of counsel, and abuses the character of gentleman.

The District Attorney: All I have to say is, that I return the insult; your conduct has been ungentlemanly.

Mr. Bradley: You can return the insult as much as you please. I despise you. Say what you please to the jury, I shall not interrupt you again. Here is a chip on my head: come and knock it off.

THE COURT: Mr. Carrington, the Court will not permit you to go on without expressing a strong condemnation of language of that kind, which it thinks entirely without foundation in the evidence.

Mr. Bradley: Thank you, sir.

The District Attorney: Will your Honor be kind enough to make some remarks of that description in regard to the attack upon Dr. Burroughs?

THE COURT: That occasion has passed. I understood the attack upon Dr. Burroughs to be confined to the character of his evidence, compared with itself, and compared with the evidence of other witnesses. I thought that it was a pretty severe investigation, to be sure; but then it was not a mere calling of names and denunciation, without evidence to support it of some kind, whether sufficient or not. I do think that this denunciation upon the Misses Devlin's moral reputation, outside entirely of the evidence in the case, ought not to have been made, and is deserving of the strongest and severest censure which the Court can declare. I had hoped, Mr. Carrington, that you would not go beyond what you knew, and especially in regard to a female witness, who is here, to all appearances, without a protector.

The District Attorney: I thought I was entirely justified by the evidence. I may be wrong, but I think my attack is not half so severe as that made upon Dr. Burroughs.

THE COURT: You must not retaliate upon the Misses Devlin.

The District Attorney: I refer to the whole city of Chicago in regard to the Rev. Dr. Burroughs. When he is denounced, I thought it was my duty to expose properly the testimony of the Misses

Devlin. The Judge thinks I have gone too far, and so does Mr. Bradley. I will say, gentlemen, that it is not material to this case whether you believe either the Misses Devlin or Dr. Burroughs, or discard both of them.

Mr. Carrington: Afterwards, gentlemen of the jury, you find that she and Miss Devlin are prompted by an "insane impulse," to go about the same time away from the city of Chicago. The prisoner at the bar, prompted by a sane impulse, (for that was a very sane idea probably) goes to the city of Baltimore and consults a lawyer in reference to the policy and propriety of bringing a suit for a breach of promise of marriage. In conversation with that lawyer, she tells him that her love for Burroughs had turned to hate.

"Heaven has no rage like love to hatred turned,
Hell has no fury like a woman scorned."

Prompted by "hatred." Out of her own mouth do I condemn her. Prompted not by "insane impulse," but by hatred she comes to the city of Washington to institute a suit for a breach of promise of marriage. She does not put her writ in the hands of the marshal, but she goes in person to the Treasury Department,—let us admit with the writ in one hand and the pistol in the other. When she arrives there, she inquires for Mr. Burroughs. She is told that there are two gentlemen there of that name; and this woman, who it is attempted to be shown to you was insane, says that she wants to see Mr. Adoniram J. Burroughs, and examines the register, finds his name, is shown to his room, and looks in. She does not fire. Was that the best opportunity? No! Mrs. Woodbridge was, I believe, in a direct line with Burroughs. She might have killed both. There he is at his desk in the discharge of official duty. Old Mrs. Woodbridge sitting near him. She first sees the person and is prompted to get up and ask what she desires, and to extend an invitation to her to walk in. But just then she retires. How far, gentlemen of the jury? Down to that clock, which has been explained to you in the testimony, and there takes her stand. How long does she remain there?

As I said in my opening address, and as appears I think from the evidence, there was time to hear the ticking of the clock and observe the movements of the hand. There was time for the clerks to be discharged, for young Burroughs to make his arrangements for the next day, and start on his way home in company with a companion. There was time for passion to subside and reason to resume its sway. There was time for "insane impulse" to pass away, and the power of volition to return. He passes by. She fires at him deliberately. He falls; she fires a second time, aiming directly at his head. Then she endeavors to escape, and losing her way feels the heavy hand of justice upon her. She is arrested. She is cool, calm, collected. She told the officer that this man had injured her. She wanted revenge, and would have it at the risk of her life. She showed no emotion until the bleeding, mangled corpse of her murdered victim is brought into her presence. And this is evidence of insanity! It is evidence, gentlemen of the jury, of sanity. It is woman's nature speaking out. When Lady Macbeth was reproving her husband for his irresolution, she said, "I had done the deed, but the gray-haired Duncan resembled my father as he slept." Proud, cruel, ambitious woman. Still she was a woman. So, Mary Harris, having accomplished her purpose, and when she sees before her the bleeding evidence of her guilt, suffers the pangs of remorse. This is sanity. Can you interpret it to be evidence of insanity?

Now, gentlemen, that is this case, and what do you call it? Science, as the learned counsel understands it, calls it "insane impulse." Science, as I understand it, and as I think you understand it, gentlemen of the jury, calls it murder. The law as they understand it, calls it "insane impulse;" but the law, as I understand it, and as the Judge interprets it, as I shall contend, calls it murder. Common sense calls it murder, cruel, revengeful murder, unrelieved by a single mitigating circumstance, and it is idle to shut our eyes to a stern and solemn truth.

Now, gentlemen of the jury, if this be science, as they understand it, in my judgment, it is time that the great portion of us, I include myself among the number, should be dressed in strait jackets, and locked up in the insane asylum.

Mr. Bradley: I agree.

Mr. Carrington: If a man or a woman, prompted by revenge, can lie in wait and commit a deliberate, wilful murder, and science calls it "insane impulse," of course Mr. Bradley will agree with me when I say, "Dissolve society into its original elements, raze your churches, your courts of criminal jurisprudence, close your Bibles, and tell your daughters to learn to be marksmen, and to arm themselves with a pistol, and the assassin's dagger." When the husband goes out to work for his daily bread, his wife should stand by his side, with a pistol in one hand and a bowie-knife in the other, to protect him against the "insane impulse," of some wicked and revengeful woman, who wishes to gratify her revenge against him perhaps for some youthful indiscretion.

It is throwing open the doors wide to violence and crime, and I ask, "What man in the community is safe, if a jury so far mistake the law as to acquit this woman upon the ground of 'insane impulse'?" By such an absurd verdict, you say to every wicked woman in the city of Washington, kill a man for revenge if you please, and then take care to tear your hair, cry, and cut up a few antics, and we will call it insane impulse, and thus we will not only approve, but applaud the act.

Now, gentlemen, I think I understand you. I think I know every man on that jury. You are anxious to acquit this woman, and this may be creditable to your hearts. For it may be said to the eternal honor of the American people, that woman in this court is treated with more consideration than in any other upon the face of the habitable globe. But I undertake to show that this is a case of murder, and that this woman is not *scientifically* insane; that she is not legally

insane; that she is not practically insane; that she is not generally insane; that she is not periodically insane; that she is not spasmodically insane; that she is not even *hypothetically* insane; but that she is as sound today as she was before the murder; and this idea of insane impulse is a modern humbug. These Western gentlemen, members of Congress, come here to teach us science, and charge me with relapsing into a state of barbarism. Science, as they understand it, says insanity is that state of the mind that leaves a person all right, except just when he wants to commit a crime.

They admit that the woman is sane today, admit she was sane before the homicide, but claim that she was insane at the precise point of time she committed it.

Now, is Dr. Burroughs not corroborated? I appeal to the testimony of Danenhower; and where is there a more honorable gentleman in the city of Washington than he is? I appeal to the records of the Department, to which I have already adverted. J. C. Burroughs stands before you, gentlemen, not only uncontradicted, but corroborated. He is an unimpeached—an unimpeachable witness; illustrating the familiar truth—the highest style of man is the Christian gentleman.

The learned counsel for the accused have with great art endeavored to place the counsel for the Government in antagonism to Dr. Nichols and the other physicians who have been examined here upon this point. But I boldly assert, if you adopt the opinions of these physicians, you are bound to convict the prisoner at the bar. Has Dr. Nichols, or any other physician, dared to testify that this woman, at the time she committed the homicide charged in this indictment, was insane, and so insane as to be irresponsible for her conduct? He has not done it. He could not do it without committing the crime of perjury. Let him take his place in the jury-box, and, judging from the opinion which he has expressed as a witness, as an honest man he would render a prompt and decided verdict of con-

viction. I should be glad to see him in that jury-box, and relieve this merciful and kind-hearted jury.

Mr. Bradley: I should be glad to put him there.

Mr. Carrington: Put him there; and, judging from the opinion he has expressed on the witness-stand, as an honest juror he would render a verdict of guilty.

He has testified most cautiously. I charge you, gentlemen of the jury, as you value the cause of truth, of justice, and of public security, to understand the opinion before you endeavor to shirk your responsibility, by shielding yourselves behind it. I shall warn you, for if you render a verdict of acquittal, on the ground of insanity, it will be inconsistent with the opinion expressed by each and all of these scientific gentlemen; and you will render yourselves ridiculous, and the intelligent portion of the community will say, either that you do not understand your duty, or that it was not explained to you properly by the law officer of the Government. I now wash my hands of all responsibility; and, if you will give me your attention, I will show you so clearly, that he who runs may read, that this woman was not insane, within the legal acceptance of the term, and to acquit her upon the ground of insanity would be in clear opposition both to the law as expounded by the Court, to the testimony of the witnesses, and to the opinions expressed by the physicians. Dr. Nichols expressed an opinion upon a purely hypothetical case; not upon the case at bar. He did not hear the whole evidence-in-chief offered by the prosecution, or any of the rebutting evidence offered by us, and he assumed, as proved from the evidence, that he did not hear, facts which are not proved.

THE COURT: Dr. Nichols heard all the evidence. He did not speak from a hypothetical case.

Mr. Carrington: He did not hear the testimony of Mr. Everett, one of the most important witnesses examined-in-chief on the part of the prosecution, and he did not hear any of the rebutting evidence. And, in addition to this, he

did not, even upon the evidence he did hear, express the opinion that this woman, at the time the homicide was committed, was so insane as to be irresponsible for her conduct. How could he have expressed such an opinion? Your Honor should have stopped him if he had, for it would have been allowing the physician to transfer himself from the witness-stand to the jury-box. No! The responsibility is upon you, gentlemen of the jury, and you cannot as honest men avoid it. The opinion of Dr. Nichols, as I have already stated, is expressed upon an assumed state of facts. First, he assumes as proved that there was a marriage contract, which was broken; secondly, that the prisoner was melancholy in consequence of disappointed love; thirdly, that she had received a dishonorable proposition from her lover, contained in these Greenwood letters, or believed she had; fourthly, that she was suffering from dysmenorrhœa at the time.

Now, I propose to show that he was mistaken in all these facts. Then, gentlemen, if I show the causes do not exist upon which he bases his opinion, of course the effect of those causes cannot follow as he supposes. In other words, gentlemen, if these are the facts upon which his opinion rests, and I show you that these facts do not appear from the evidence, the opinion is hypothetical, and cannot be regarded by you in forming your verdict. He erects a super-structure upon these four stones. I intend to remove them one by one, and then the entire fabric falls to the ground. First, then, gentlemen, was there a marriage contract? A marriage contract, like every other contract, requires the consent of both parties. I defy you to discover a marriage contract from any of the ninety-two letters offered in evidence. But let us admit, for the sake of the argument, that there was a marriage contract. I maintain that, if there was, it was violated by the lady herself.

I cannot read this letter, gentlemen, perhaps, as it should be read. I saw some of you crying. What are you

crying about. *I cannot cry. I will have to get my friend Mr. Bradley or Judge Mason to cry for me.*

Mr. Bradley: If you had half as much sensibility as we have you would cry also.

Mr. Carrington: Cry for what? Perhaps I committed a mistake, gentlemen. I should have put some one of these ladies on the stand as an expert. This letter echoes the groans of a discarded and despairing lover. How, then, stands the case? The lady discards her true-hearted, honorable lover; and he, like a man of honor, offers to return her her letters and her portrait, and try his fortune in another quarter. The lady, exercising a woman's right, in a spirit of coquettishness, discards the man she loves, and then, fired by the demon of jealousy, murders him for marrying another, her superior in all respects. What, then, is the opinion of Dr. Nichols worth when he assumes she was suffering because her lover had violated his promise of marriage? I said in my opening address, and I now repeat it, that A. J. Burroughs died without a stain upon his honor. Is there anything dishonorable in this? Is it dishonorable to love a pretty girl and to tell her so? Then let him who is without sin cast the first stone. And when discarded by one pretty girl, is it dishonorable to love a prettier and a better girl, and to tell her so? Burroughs loved Mary Harris tenderly and devotedly, if these letters breathe the spirit of true love. He was discarded by her; and meeting with another lady, her superior, loved her, offered her his hand and heart, and, like a true-hearted woman, she neither flirted nor coquetted with him, but promptly gave him all that a woman has—a woman's love

Again it is said that the prisoner suffered from melancholy, too, in consequence of disappointed love. Gentlemen of the jury, was she melancholy? This is a technical term, and has a technical signification. We all know what is meant by suffering from insane melancholy. In looking through the evidence we see this *poor, melancholy, love-sick* girl playing cards, attending parties, conversing with a

young gentleman on the very morning she started for the city of Washington, bent upon her murderous purpose, and collecting money for the Misses Devlin in her usual good health and spirits. Did she suffer from disappointed love? True love, gentlemen, is a noble, pure, and generous passion. It refines the manners, purifies the heart, elevates the thoughts, gives zest and delight to every energy and to every aspiration.

“Yes; love, indeed, is light from heaven;
A spark of that immortal fire
With angels shared, by Allah given,
To lift from earth our low desire.”

Did Mary Harris love the man she so cruelly and inhumanly murdered? No, gentlemen of the jury. The kind, gentle, and loving wife may, in a moment of passion, speak an unkind word to her devoted husband; but when she sees him in danger or distress, she will rush to his assistance.

“Ah, woman! woman! in hours of joy and ease
So coy, and so hard to please;
But, when pain and anguish ring the brow,
A ministering angel thou.”

Did the tender and sacred flame ever burn in the heart of this cruel and revengeful murderess? To say that she ever loved, with a pure and a holy love, A. J. Burroughs, is an insult to every honest and virtuous woman in the land. What, then, becomes of the opinion of Dr. Nichols, when he assumes, as a fact proved in the case, that the prisoner was a poor, melancholy, love-sick girl, who committed this horrid crime while in a state of insanity? If woman is to be excused on this ground, you give a *carte blanche* to any lewd and wicked woman to commit violence and crime. Go to yonder alley in any populous city. See that woman; her aching brow leaning upon her hands; the paint is washed away; she is pale, emaciated, sad, and degraded. Who is she?

“She once, perhaps, in village plenty blest,
Hath wept at tales of innocence distress;
Her modest look the cottage might adorn,

Sweet as the primrose peeps beneath the thorn;
Now lost to all—her friends, her virtue fled—
Near her betrayer's door she lays her head."

Ask her the story of her life, and she attributes all her woes to disappointed love.

Her case is a more distressing one than that of Mary Harris; and would you say upon your oath as jurors, that such a one was insane, and for that reason has a right by law to murder in cold blood the man who ruined her?

Thirdly, Dr. Nichols assumes that the deceased was the author of the Greenwood letters, or that the prisoner supposed he was, and thus she received a great shock to her moral sensibilities. Adoniram J. Burroughs was not the author of those letters. I appeal to the testimony of the Rev. John C. Burroughs, corroborated and confirmed by the testimony of Danenhower, and the records of the Treasury Department. The prisoner knew that he was not the author of those letters; for at the suggestion of the Devlins she went to the house of the Rev. J. C. Burroughs, and was satisfied from that interview that he was not the author of the letters, and she returned to her home entirely relieved of all suspicion. It is true the Devlins were not satisfied, and it was not their purpose to be satisfied; but Mary Harris was. What, then, becomes of the opinion of Dr. Nichols? Her sensibilities were not shocked; but, on the other hand, the sensibilities of the deceased were shocked in consequence of the unexpected discarding by the woman he truly and honorably loved.

Fourthly, Dr. Nichols assumes that she was suffering with dysmenorrhœa at the time the homicide was committed. This is not so in point of fact, judging from the evidence. Mrs. Flemming testifies that she saw her the day previous to the homicide, and that she complained of a slight sore throat, but was in other respects in good health. No girl could be suffering with that complaint without its being known by an old woman with whom she was boarding at the time. Every old woman in the country understands the

complaint, and knows how to cure it—simply by putting the patient to bed, applying a few warm bricks, and administering a little hot tea. Mrs. McWilliams saw her shortly before the homicide, and her testimony is inconsistent with the idea of her suffering with dysmenorrhœa at the time of the homicide. Dr. Young, the physician of the jail, testifies that she was *unwell* on the 16th of June. The homicide was committed on the 30th of January, and therefore, in the regular course of events, it is possible, but not probable, that she was suffering with dysmenorrhœa at the time she murdered Burroughs. Gentlemen of the jury, if you acquit the prisoner by assuming that she was insane from facts like these, you perceive that you render a verdict utterly at variance with the evidence.

But assuming, for the purposes of the argument, that I am wrong in all I have said, what is the opinion of Dr. Nichols? I have it here. He says that this woman, if insane at all, was paroxysmally insane; and if insanity was the cause of this murder, it was that kind of insanity known as “insane impulse.” It is evident, from an analysis of this definition, that, in order to acquit this woman upon the ground of insane impulse, you must be satisfied from the evidence that she unexpectedly met with the man who had injured her, or whom she supposed had injured her, and suddenly drew her pistol, which she happened to have about her person for no particular purpose, without being able to restrain herself, or appreciate the character of the act she was committing. By way of illustration, just as a person suffering with typhoid fever would suddenly seize some deadly weapon lying near him, and strike either friend or foe. Is that this case? Shall I repeat the evidence? She armed herself with a pistol, tracked up her victim, concealed herself, laid in wait for him, fired at him, and then, deliberately stepping into the center of the hall through which he passed, cocked her pistol and fired a second time.

Now, in regard to the opinion of Dr. May, I have a word to say. This eminent physician, in reply to a hypo-

thetical case put by me, said he did not think the supposed patient was insane. Judge Hughes says I brought this hypothetical case from the moon. If that is so, then Mr. Bradley's hypothetical case was borrowed from some distant planet, for I do not think that he has presented the facts of this case so accurately and so fairly as I have done. They are both hypothetical cases, and the Court should not allow the doctor to express an opinion upon any other, for it would contravene a familiar and well-settled rule of law. In answer to Mr. Bradley's hypothetical case, Dr. May says the patient was insane, and upon cross-examination he gave his reasons for it.

First, he assumes that the prisoner had been suffering from melancholy, resulting from disappointed love; second, from a shock to her moral sensibilities; third, that she did not attempt to escape after committing the homicide; fourth, that she did not know the man was dead after she had killed him. It needs no doctor, nor does it need any ghost from the grave, to tell us that such a person was insane. If you believe from the evidence that Mary Harris was suffering from insane melancholy, resulting from disappointed love, and that after killing Burroughs she did not know that he was dead, or did not know what she had done, and made no attempt to escape, or conceal the crime she had committed, I apprehend you would conclude that she was actually insane. But is that this case? I have already argued that she was not suffering from melancholy, resulting from disappointed love; that she had received no shock to her moral sensibilities. Did she not attempt to escape? The evidence is that when Burrough fell, having endeavored to escape from the building, she lost her way and was arrested in the basement. Did she not know what she had done? She told the officer that Burroughs had injured, had seduced, had ruined her, and she was determined to have revenge at the risk of her life. She shows no emotion, to be sure, until she sees his mangled and bleeding corpse; and then she

suffers, as I have already said, as any other sane woman would, however depraved, the pangs of remorse.

It must have amused you, gentlemen of the jury, to have seen the senior counsel for the defense—the father of the bar, the venerable Joseph H. Bradley—appearing in the double capacity of counsel and witness—of lawyer and doctor! When the learned counsel took the witness stand, he reminded me of an old lawyer—to put a hypothetical case—who came out to Western Virginia for the purpose of practicing law. He settled in the village, rented an office, swung out his shingle, and the next morning the following advertisement appeared in the village paper: “The undersigned will practice law in this town. Fees moderate, except when evidence is furnished.”

Mr. Bradley: Mr. Carrington, do you intend, sir, to impugn my motives?

Mr. Carrington: Certainly not.

But lets us analyze his testimony. He says he observed a peculiar dilation of the pupils. Have you never observed that before, gentlemen of the jury? Did you never see the gentleman’s pupil dilate when he was replying to some attack that I had made upon his client in a desperate case?

Again, it is said that she could not sleep; and in the silent watches of the night, when honest people were sleeping quietly, she heard unusual and unearthly sounds. Is there anything remarkable in this, when we remember that she had stained her conscience with innocent blood, and that she was suffering the pangs of remorse? After the murder of Duncan, Lady Macbeth advised her husband to sleep, to think no more of his crime, or it would run him mad. He cried “Sleep no more; Glamis hath murdered sleep!”

But, gentlemen of the jury, I shall not trouble you by reviewing the whole of Mr. Bradley’s testimony. I see nothing in it inconsistent with the sanity of the prisoner, in view of the fact that these vagaries, to which he testifies, occurred

subsequent to the homicide—after the excitement was over, and the prisoner was confined in jail.

Mr. Voorhees asked if I intended to charge Joseph H. Bradley with fraud? Certainly not. He knows, and my brethren of the bar know, my regard and respect for him; and, if any man on the street should charge him with fraud in my presence, I would be prompted by an “insane impulse” to knock him down.

Mr. Bradley: I thank you, sir.

Mr. Carrington: The part he has acted in this case is creditable to his heart. I do not think, however, that he is in a state of mind to testify intelligently on the subject of insanity; for I have never seen his feelings so much excited before.

But I shall continue this discussion no longer. You know that this woman is not insane. If you acquit her upon the ground of insanity, it will be a pretext only. Now, gentlemen, if you wish to acquit her, do it because you want to do it; but do not render yourselves ridiculous by listening to this nonsense of insane impulse.

Here allow me, however, to give you an admonition. Perhaps there are some higher-law men upon that jury, who have determined to take the law into their own hands, and mould it to suit their own views. If so, it is my duty to inform you that you commit the crime of perjury before your country and high Heaven; for you have solemnly sworn to decide this case according to the law as it is, and not as you think it ought to be.

How often do you hear this defense of insanity? It is relied on in every desperate case of murder, and it is generally treated with contempt by honest and intelligent jurors. If some poor, trembling criminal in rags and tatters should dare to make such a defense as this, it would be hooted out of court. Why should a different rule be adopted in the case of Mary Harris? Why was she not subjected to the inspection of the jury? For your custom is, when the defense of insanity is made, to examine the prisoner carefully for your-

selves, and form your opinion from a personal inspection and examination of the accused. But it was not so in the case of this veiled and mysterious murderess.

Whenever I hear this defense of insanity, it reminds me of a remark that was made to me by my predecessor, Mr. Fendall. He had just purchased a book upon homicide. He met old Col. Benton on the street, when the latter asked him what work he had? He replied, "Sir, I have a work on homicide." "Why," said Col. Benton, "your money has been misspent. There are only two defenses in cases of homicide in this country—self-defense and insanity." Col. Benton was right, gentlemen of the jury. If a man injures another, and the injured party kills him, he pleads self-defense. If a man kills another, who has never injured him, it is said that there was no motive, and therefore he was insane. The result is, that skilful counsel may persuade judges and jurors, who have not the firmness and intelligence to discharge their duty, to give unbridled license to the crime of murder. Put your foot upon this nonsense of "insane impulse." If *you* do not, *I* will. If you approve of this defense by your verdict, it shall be against my earnest and solemn protest. I now solemnly protest against this libel upon the laws and religion of my country. When the excitement of the day passes off, and murder, crime, and blood run riot in your city, no man or woman shall say it was I who did it.

Now gentlemen of the jury, let us consider the motives which prompted the prisoner to the commission of this bloody deed. You have heard a great deal said by the learned counsel about the dark ages. Why, even in the dark ages, in the age of chivalry, when the bloody code of honor was the rule, the injured lady called upon her hero, and the dispute was settled by the wager of battle, in an open field, under a clear sky, where man met man face to face and beard to beard. They never employed the assassin's dagger to redress even the blackest and the foulest wrongs. If this injured lady had been governed by the

bloody code of honor, she would have appealed to her father, to her brother, or some friend—perhaps to the young Tydides. In this country a thousand swords would leap from their scabbards to avenge a look that threatened with injury or with insult an honest and a virtuous woman.

Gentlemen of the jury, we do not sit here to administer the law according to the bloody code of honor. We are Christians; we live in a Christian age and are a Christian community; and we can neither recognize nor tolerate any redress of wrongs, whether real or imaginary, except by an appeal to courts of justice.

It is true that Washington juries have heretofore approved the redress of private wrongs by private means, and juries have been severely censured for it. I never complained of the verdict of a jury, and I intend to express no opinion in regard to your conduct on former occasions. Sickles, and I mention his name with respect, for he has proved to be a true patriot and a gallant soldier, murdered a man who had, or whom he supposed had, wronged him in the tenderest point, while he was standing near his house, flaunting a handkerchief in front of his window, in a moment of frenzy, which might with some plausibility be called a species of "paroxysmal insanity." Jarboe went with his sister into the presence of her seducer, and demanded reparation. He attempted to draw a weapon, when the indignant brother shot him dead. This, too, with some show of plausibility, might be called a case of "paroxysmal insanity."

On the other hand, Daniel Woodward slew his wife in a fit of jealousy, and was convicted, sentenced, and executed. Mary Harris, from jealousy and a desire of revenge, deliberately murdered the man who had loved her and never wronged her.

Gentlemen of the jury, it is idle to close our eyes to the truth. It was not insanity, either paroxysmal, scientific, or by whatever name you may be pleased to call it, but it was jealousy! jealousy! I have seen a personification and rep-

resentation of the passions upon canvass—hatred, envy, malice, revenge, and jealousy; and in this collection of imaginary demons the most horrible to behold is the green-eyed monster. But it is no excuse for crimes. It never has been, and never can be, where the law is properly administered. Mr. Bradley, in his opening address, admits that this is a case of jealousy. You remember his remark, “It is the old story of Othello.” But there are marked points of difference between his and the present case. Othello, when he entered the chamber of his true and faithful wife, on the fatal night when she was doomed to die, said:

“Desdemona, have you prayed tonight?

Yes, my lord.

Bethink you of any sin unforgiven?

Yes, my lord; loving you too well.

Then pray; for I would not kill thy unprepared soul.”

Not so with Mary Harris. She strikes young Burroughs down, and sends his soul into eternity without a word of warning, or time to breathe a single prayer. After the bloody deed was done Othello relents, exclaiming:

“If the world were one entire and perfect crystallite,
I would give it all to restore thy precious life.”

Not so with Mary Harris. She is now seen, like a horrid ghoul, burrowing in the grave, and feeding her revenge upon the remains of her murdered victim; and through her counsel, her organ and representatives, who speak her sentiments and represent her views, she endeavors to destroy the reputation of his only brother, the natural guardian and protector of his widow and his orphan.

But, gentlemen, there was one other motive that prompted Mary Harris in this bloody tragedy, and that was the desire of money. As I have already stated, there was another person behind the scenes, pulling the wires, when this dark and dreadful deed was committed; and that was Louisa Devlin. I do not mean to say that Louisa Devlin expected to realize money from the *murder* of Capt. Burroughs; but her object was to profit by a suit of breach of promise of

marriage. You well remember the testimony upon this point. After the prisoner returned from the interview with Dr. Burroughs, in reference to the Greenwood letters, she expressed herself as entirely satisfied, and apologized for the intrusion. But the Devlins were not satisfied. They fired the jealousy of this love-sick girl, by representing that Burroughs was the author of the Greenwood letters, notwithstanding the representation of his brother, and then urged her on to institute this suit for a breach of promise of marriage. The prisoner, finding she could not maintain that action, contrary to their expectations, no doubt, in a moment of jealousy, revenge, and disappointment, committed this terrible murder.

Now, gentlemen of the jury, I reach the last, and, indeed, the only real defense to this indictment. I approach it with fear and trembling, for I do not see how I can meet it successfully, in view of the extraordinary, but powerful sympathy that has been elicited on behalf of the prisoner. It is this: That she is a pretty, delicate, little woman. That is all. This is really the only defense, and you know it. If you acquit this woman, it will be because she is a woman; and all this nonsense about insanity and moral justification are simply to afford you a pretext. It is said that she wanted to be the wife of the deceased. Wife, indeed! That name is sacred as heaven itself. It is associated in our minds with all that is good, amiable, and attractive. And what sort of a wife would this woman have made, who had the heart to conceive, and the hand to execute this bloody deed? Had she married young Burroughs,

"No heavenly choirs had the hymenean sung."

It might have been said, with more truth than poetry,

"Nor Hymen, nor the Graces should preside,
Nor Juno to befriend the blooming bride;
But Fiends, with funereal brands, the process led,
And Furies waited at the genial bed."

When a man of honor strains to his bosom the woman he loves, and calls her his own, his darling wife, and imprints

the melting kiss upon her matron lips, he must feel and know that she is

"As pure as an icicle,
That hangs from Diana's temple."

But suppose he hears that she has been to an assignation-house—no matter for what purpose; and has conversed with the proprietress of that infernal den—no matter upon what subject; inhaled its pestilent atmosphere; that she had gone to a prostitute, and inquired whether her lover was faithful to her? His love would turn to disgust, and he would dash her, like a loathsome weed away, if it wrung his very heart-strings.

I admit that Burroughs once loved Mary Harris. But she was unworthy of his love, for she never truly loved him; while, judging from these letters, he loved her with an intensity and ardor which is creditable to his heart, if not to his head. These letters contained the most violent protestations of love. Like Shakespeare's Romeo, young Burroughs was affectionate, demonstrative, and violent in his attachments, but honorable and true.

It is true, these letters are written in a most extravagant strain. He calls her "ducky," "a darling," "a rosebud," a "sugar plum." This is the ordinary language of love. My objection to it is, that it is too tame. When he begins to talk about his hair standing on end and flying through the air, he is just rising to the height of his great argument. But in these ninety-two letters I challenge you to place your finger upon a single dishonorable sentiment or a single impure sentence.

Have I not, then, redeemed the promise which I made in my opening address, to show you that Capt. Burroughs lived and died without a stain upon his honor?

No term of endearment is too strong to be applied by a man to the girl he loves. No demonstration of affection too expressive, provided he is neither impure nor dishonorable. I would not give a bawbee for a young man who did not love

the woman of his choice with an intensity which no language is adequate to describe.

Go back in imagination, gentlemen of the jury, twenty years. Think, each one of you, of the sweet words you have whispered into the ears of the girl you love, and the *billet-doux* that you have written her in those halcyon and happy days. How would you like to have them exposed to the vulgar gaze of the public? If such demonstrations are evidence of insanity, you and I, and every true-hearted man, should be dressed in straight-jackets, and turned over to the tender mercies of Dr. Nichols, this propagator of the new and dangerous doctrine—this modern philosopher of the humbug of “paroxysmal insanity.”

Having shown that this homicide was committed by the prisoner at the bar, and that it is not excusable, I reach the fourth and last problem, What is the quality of the homicide? Is it murder or is it manslaughter? I have already indicated to you, in my opening address, the distinguishing characteristics of these two grades of offenses, and I think it unnecessary to pursue the discussion further, for there was neither passion, nor sufficient and recent provocation. On the contrary, it was wilful, deliberate, and premeditated, and committed under circumstances of great aggravation, showing a heart regardless of social duty, and fatally bent on mischief. It is a case of murder; cold-blooded, cruel, causeless murder. Notwithstanding the strictures of the learned counsel for the accused in regard to my reference to the place where this homicide was committed, I repeat that it is, in my judgment, a fearful aggravation of her guilt that she slew a public servant while at his post of duty, and who drew his sword in his country's cause in that hour of national danger and distress, when loyal, patriotic men constituted the great wealth and the chief hope of the republic. And this, too, in the capital of a great nation. I did say, and I repeat, that Washington juries have an unenviable reputation abroad. We have no representation in Congress. We are under the power, and to a great extent under the influence, of the States;

but I call on you again to maintain your dignity and your self-respect, and to vindicate the majesty of the law.

Let it not be said that eminent criminals, defended by prominent public men, may commit a crime with impunity in the federal metropolis. Why did not this prisoner, I repeat, take the life of the deceased in Chicago, if he injured, or if she supposed he had injured her? Did she suppose, as many do, that here she could gratify her revenge with impunity? I say what I have often said before, that the citizens of Washington are a law-loving, law-abiding, and a religious people, but it is a rendezvous of thieves, murderers, garotters, and adventurers, of both sexes and of every variety—a sewer for all the vices and immoralities of the age in which we live. Our only hope of safety is in the firmness and fidelity of the judiciary. I plead the cause of law, order, and religion; and if you dishonor the records of this court by an approval of this bloody deed, it shall be against my earnest and solemn protest. This is a central and a radiating point. We exert an influence in all sections of this great confederacy. Besides, strangers judge our people from the manners and customs of the federal metropolis. I charge you, then, gentlemen of the jury, to remember the solemnity of your position, and take care how you outrage the public sentiment, and libel the community of which you are the representatives on this occasion. I see what is passing in your minds. I can read your thoughts. You pity the prisoner at the bar. So do I. You wish to shield her from the consequences of her crime. I have no objection to this, provided the law is enforced. How is it to be done? It is the simplest thing in the world. The legislature, in its wisdom, has provided for such cases. Convict the prisoner, and then commend her to the mercy of the Executive. Do this, and your object is accomplished without violence being done to any man's conscience. If the prisoner, in view of all the circumstances, deserves clemency, she will receive it; but in my opinion, stern, inflexible justice is true mercy. I would have you temper justice with a spirit of

mercy, but I would not have you sacrifice the cause of justice to mercy. When man broke Heaven's high law, his Creator looked down upon him with compassion. He would show him mercy, but the claims of justice must be vindicated; and in the counsel of eternity He determined to give his well-beloved and only-begotten Son to die, that guilty man might live, and by his imputed righteousness alone we are saved. I charge you, then, in the same spirit, to do justice, and then remember mercy. You are now the great conservators of the public peace; and I charge you, by the solemn sanction of a juror's oath, in the eloquent language of another, "that adamantine chain which binds the integrity of man to the throne of eternal justice, do your duty in the fear of God and without the fear of man."

THE VERDICT.

The *Jury* retired and in five minutes returned into court with a verdict of *Not Guilty*.

THE TRIAL OF NATHANIEL JENNISON FOR
ASSAULT AND FALSE IMPRISONMENT,
WORCESTER, MASSACHUSETTS, 1783.

THE NARRATIVE.

In the year 1783, a citizen of Massachusetts was tried at Worcester before four judges of the Supreme Court, for assaulting, beating and imprisoning a black man. The defense was that the negro was a slave, brought from Africa and sold to a person who many years before had sold him to the husband of the defendant's wife, at whose death and his marriage with the widow, the black had become his property. And he produced the bill of sale made in Massachusetts thirty years before, conveying the negro with his mother to the former owner.

But the Chief Justice told the Jury that although slavery had formerly been countenanced in the then colony, the Constitution of 1780 declaring "all men free and equal," had abolished it in Massachusetts for all time.

THE TRIAL.¹

*In the Supreme Judicial Court of Massachusetts, Worcester,
Massachusetts, April, 1783.*

HON. WILLIAM CUSHING,² *Chief Justice.*

HON. NATHANIEL P. SARGEANT,³

HON. DAVID SEWALL,⁴

HON. INCREASE SUMNER,⁵

} *Justices.*

¹ *Bibliography.* "The case of Nathaniel Jennison for attempting to hold a negro as a slave in Massachusetts in 1781. From the minutes of Chief Justice Cushing with references to contemporaneous records. Communicated to the Massachusetts Historical Society April 16, 1874, Boston. Press of John Wilson and Son, 1874."

² See: 2 Am. St. Tr. 178.

³ See: 2 Am. St. Tr. 178.

⁴ See: 2 Am. St. Tr. 178.

⁵ SUMNER, INCREASE. (1746-1799) Grad. Harv. 1767; Justice Supreme Court, 1782-1797; Governor of Massachusetts 1797-1799.

April 14.

In August, 1781, an indictment was returned against Nathaniel Jennison of Barre in this county for an assault and battery and false imprisonment of a black man named Quack Walker.⁶ The prisoner pleaded not guilty.

The following jurors were impaneled and sworn: Jonas How (Foreman), William McFarland, Isaac Choate, Joseph Bigelow, John White, Daniel Bullard, Ebenezer Lovell, Phillip Goodridge, John Lyon, Johnathan Woodbury, Thomas White and John Town.

Robert T. Paine,⁷ Attorney General for the Commonwealth.

Mr. Paine: The negro was born in Caldwell's house, who engaged he should have his freedom at 25—his widow, who married defendant, promised the same when he was 28—dismissed—and defendant attempted (to retake him?)

TESTIMONY FOR THE GOVERNMENT.

Mr. Caldwell: The negro came to my house about a week before the warrant. He was at work in my field with a team working—heard a screaming—got upon a knoll 5 or 6 rods from Jennison and several others, who had got the negro down, young fellow upon the negro, I took him off—bruised his fingers—carried him off—went to a saw-mill—and told Jennison his master had freed him—and Winslow let him go—wounds in his hands and arms.

My brother said always he should be free at 25—Mrs. Caldwell that he should be free at 21.

Quack: I was harrowing. Ten years old when master Caldwell died. Mrs. lived a number of years before she married again. I lived with Dr. Jennison 7 years and $\frac{1}{2}$ after I was 21. My old master said I should be free at 24 or 25. Mistress told me I should be free at 21—said so to Jennison, before and after marriage.

THE DEFENSE

(From Zachariah Stone to of Mingo and Dinah, 1754, and Caldwell, deceased—Bill of Sale Quaco, 9 months old.⁸)

⁶ This is his name in the minutes of the Chief Justice. In the indictment it is Quock, in the civil actions, Quork and Quorko and in the bill of sale, Quaco.

⁷ See: 2 Am. St. Tr. 179. 10 Id. 421.

⁸ It was also introduced in evidence in the civil action and was as follows: Rutland District, May 14, 1754. Sold this day to Mr. James Caldwell of said District, in the County of Worcester and Province of Massachusetts Bay, a certain negro man named Mingo,

Charles Baker: I was divider of Caldwell's estate. (About 20 years ago he died. Two or 3 years after, the widow received Quaco as part of her dividend.

Mr. Jones: Quaco lived with Caldwell till he died—appraised

at £40—set off to his Mrs. as part of her personal estate. She married Jennison about 1770, and died about 3 years after.

Joshua Winslow: I was desired by defendant to help him reclaim Quaco.

CHARGE OF THE CHIEF JUSTICE.

Fact proved.

Justification that Quack is a slave—and to prove it 'tis said that Quack, when a child about 9 months old, with his father and mother was sold by bill of sale in 1754, about 29 years ago, to Mr. Caldwell, now deceased; that, when he died, Quack was appraised as part of the personal estate, and set off to the widow in her share of the personal estate; that Mr. Jennison, marrying her, was entitled to Quack as his property; and therefore that he had a right to bring him home when he ran away; and that the defendant only took proper measures for that purpose. And the defendant's counsel also rely on some former laws of the Province, which give countenance to slavery.

To this it is answered that, if he ever was a slave, he was liberated both by his master Caldwell, and by the widow after his death, the first of whom promised and engaged he should be free at 25, the other at 21.

As to the doctrine of slavery and the right of Christians to hold Africans in perpetual servitude, and sell and treat them as we do our horses and cattle, that (it is true) has been heretofore countenanced by the Province Laws formerly, but nowhere is it expressly enacted or established. It has been a

about twenty years of age, and also one negro wench named Dinah, about nineteen years of age, with her child, Quaco, about nine months old; all sound and well; for the sum of one hundred and eight pounds lawful money, received to my full satisfaction, which negroes I, the subscriber, do warrant and defend against all claims whatsoever. As witness my hand,

In the presence of:

Jno. Morray,

John Caldwell.

Zachariah Stone.

usage—a usage which took its origin from the practice of some of the European nations, and the regulations of British government respecting the then Colonies, for the benefit of trade and wealth. But whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses) features) has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract.

Verdict guilty.

It is therefore considered by the COURT, that the said Nathaniel Jennison pay a fine to the Commonwealth of forty shillings, pay cost of prosecution and stand committed till sentence be performed.

In May, 1781, the negro had brought a civil suit for assault and false imprisonment against his master, to which Jennison pleaded that, long before the date of the writ, "one Caldwell, being seised of the said Quork as of her own proper negro slave, was duly married to and became the lawful wife of the said Nathaniel, by means whereof the said Nathaniel, being the lawful husband of the said (Caldwell), became possessed of the said Quork as of his own proper negro slave, and so the said Nathaniel says that the said Quork, at the time of suing out the said writ and long before, and ever since, was the proper negro slave of him the said Nathaniel." The plaintiff replied "that he the said Quork is a free man, and not the proper negro slave of the said Nathaniel." The jury returned a verdict for the plaintiff for £50 damages. The defendant appealed

to September term 1781 of the Supreme Judicial Court, but, failing to appear there, the judgment was affirmed.

On May 28, 1781, Jennison brought an action of trespass on the case against John Caldwell and Seth Caldwell, alleging that, on April 2, 1781, at Barre, "a certain negro man named Quarko" was the plaintiff's servant, and was kept, retained, and employed by him as his servant in and about his proper affairs and business; yet the defendants, well knowing the premises, but maliciously contriving to injure the plaintiff and deprive him of the benefit and service of his said servant, unlawfully solicited and seduced the said negro man from the business and service of the plaintiff, and caused and procured him to absent himself from his said master's service; by means whereof said servant did absent himself from such business and service; and the defendants unlawfully kept, retained, and employed the said negro with them in their own proper business for six weeks, against the will and without the consent of the plaintiff, and did unlawfully take and rescue out of the plaintiff's hands and possession his said servant, and did hinder, prevent, and molest him in claiming and reducing his said servant to his business and service, the defendants during all the time well knowing that the said negro was the plaintiff's servant; whereby the affairs and business of the plaintiff was very much neglected, and he lost the benefit of the service of his said servant during all the time aforesaid. In the Court of Common Pleas, Jennison obtained a verdict for £25. The case was appealed and tried in the Supreme Court before Justices SARGEANT, SEWALL and SULLIVAN⁹ where judgment was rendered for the defendants.

In October, 1782, Jennison presented a petition to the Massachusetts House of Representatives, setting forth that he was deprived of ten negro servants by a judgment of the Supreme Judicial Court, on the following clause of the Constitution, "that all men are born free and equal," and praying that, if said judgment is approved of, he may be freed from his obligations to support said negroes.

On February 8, 1783, the House of Representatives appointed a committee to bring in a bill: 1st. Declaring that there never were legal slaves in this Government; 2d. Indemnifying all masters who have held slaves in fact; 3d. To make such provisions for the support of negroes and mulattoes as the committee may find most expedient. A bill passed through its several stages in the House, and was read a first time in the Senate, but never acted upon further.

⁹ See: 2 Am. St. Tr. 178.

THE TRIAL OF THOMAS J. CLUVERIUS FOR
THE MURDER OF FANNIE LILLIAN MADISON,
RICHMOND, VIRGINIA, MAY, 1885.

THE NARRATIVE.

Early on the morning of March 14, 1885, the superintendent of the city reservoir at Richmond, Virginia, found floating in the water the body of a young woman. There was no mark of identification on her clothing. A glove and a piece of shoestring were found on the embankment in a path which showed foot-prints and evidence of a struggle. There were tracks of two persons walking side by side, from a hole in the fence which enclosed the grounds of the embankment. The girl's shoe fitted the smaller track and the other was evidently that of a man. She had the mark of a blow over the right eye, but no abrasion of the skin; the left side of her lower lip was bruised by a slight blow or pressure. On her forehead were a few abrasions of the skin. The post mortem showed she died from "drowning, preceded by partial insensibility." She was eight months gone with child. The other glove and veil were found just outside the hole in the fence, her hat in a vacant house near by (evidently having been thrown through the window), her red shawl hanging on a fence about half a mile away, and her satchel containing various articles of wearing apparel, in the James river.

The body was that of Fannie Lillian Madison, aged 22, who on account of a family quarrel had left her father's house in July, 1884, and had gone to her grandfather's where she had lived until October. Then she was employed by Mrs. Dickerson in Bath county as teacher on her farm. The only male visitor she had while at her grandfather's was her cousin, Thomas J. Cluverius, a rising young lawyer of good reputation. He lived in the adjoining county and they had been intimate for several years. They were regarded as "very

fond of each other." He had frequently visited her at her father's, and before July had several times brought her in his buggy to the house of her grandfather (who was his uncle), where they would both spend the night. During her stay in Bath county as a teacher he frequently wrote to her. In her trunk after her death there were many letters from her different friends, but among them only empty envelopes addressed to her by the prisoner. Under an old newspaper spread over the bottom of her trunk were found two papers admitted to be in the handwriting of Cluverius, one a set of verses in rhyme, narrating in disgusting detail the seduction of a girl. The other paper was a letter from him to her, dated September 14, 1884. One sentence in it was, "You remember you have never written that letter you have been promising so long." The postscript read: "When are you and that fellow going to be married? You know that you told me it would be this winter. I think it would be the best thing for you; so do this winter."

On January 5, 1885, she went to Richmond under the pretext that she had received word that "poor Aunt Jane" (Mrs. Tunstall) was not expected to live and that "Cousin Tom" would meet her there. On her return on the 8th she told Mrs. Dickerson that he had met her there. She arrived in Richmond the night of the 6th and registered herself at the Exchange Hotel as "Miss F. L. Merton." Cluverius was in Richmond on the 5th and 6th of January. The clerk at the Exchange Hotel identified him as a man who came to the hotel January 6 and running his finger down the register fixed it upon the entry, "Miss F. L. Merton, 66," and then asked, "Is this lady in?" A chambermaid identified him as a man whom she saw in the Exchange Hotel three times on the 6th and who on two different occasions asked her if the lady in room 66 was in, and whom she saw that day talking to the lady in "number 66." Several other persons saw him in the streets in Richmond that day and near the ladies' entrance to the Exchange Hotel. She left the Exchange on the night of the 6th and did not return until the next morning, and her room 66 and the bed were unoccupied that night. That day she and

Cluverius were together at a house of assignation in Richmond. On March 10 Miss Madison read to Mrs. Dickerson a letter which she said she had just received from a Miss Curtis in Richmond, a former schoolmate, which said that her aunt was ordered by her physician to go to Old Point Comfort for her health, but could not go without a companion, that she, Miss Curtis, could not go and was writing to ask if she would get permission to take her place. She would pay her \$2 a day and all her expenses. "Come Thursday, 12th," the letter said, "and we will meet you. If you will ask the lady you teach for to excuse you for this short time, she will do it, I know." The letter was written by Miss Madison herself, but it enabled her to get Mrs. Dickerson's consent to go to Richmond. She arrived early on the morning of March 13, went to the American Hotel and registered herself as "Miss F. L. Merton, Virginia." About eleven o'clock a colored boy brought a note to the hotel for the occupant of "Room 21." A waiter took the note up to the room and gave it to Miss Madison. He received the reply note which was in a sealed envelope, carried it down to the office of the hotel and gave it to the boy who had brought the other note. The boy went out with it but returned in a few moments with it and gave it to a hotel clerk. The sealing of the envelope had not been disturbed; he put the note on the counter where it remained until Saturday night when the clerk reading the name on the envelope as "T. J. Clemens" looked into the directory for that name, but not finding it and the occupant of room 21 having left the hotel, he tore it up and cast the scraps into the waste-basket. On Monday he looked for the scraps at the request of a detective to whom he gave them. The handwriting on the note and envelope was proved to be that of Miss Madison, the occupant of room 21. The words of the note were: "I will be there as soon as possible, so do wait for me."

She left the hotel a little after eleven wearing a red shawl, and about noon a woman wearing a red shawl, accompanied by a man wearing a light felt hat and a light overcoat and whom the waitress thought was Cluverius, were seen on a bridge leading to Belle Isle. She in response to some remark by

Cluverius heard her say, "Why, Cousin Tommie." On Belle Isle the couple visited the iron works there, where they were noticed by several of the workmen. Between twelve and two they visited a bawdy-house in Richmond where they remained for an hour or more. She returned alone to the hotel about two, went out again at six and returned at half-past eight. A guest at the hotel who knew him well saw Cluverius about eight enter the hotel and go up to the clerk's desk. According to the night clerk at the hotel, that evening before eight, Cluverius, whom he identified, was at the American Hotel, asked to see the lady occupying room 21; he called the night porter and told him to show the gentleman to the parlor and to send his card up to the lady in room 21, and he started off to go to the parlor. The night porter "carried the lady to the parlor and left them." A little after nine they came out of the hotel and he hailed a passing street-car going out to the end of the line to Reservoir street. The driver stopped the car for them and saw them by the light of the gas-lamp. The lady had on a red shawl, the man a light grayish overcoat and carried a satchel. He identified Cluverius as the man that carried a satchel and got off his car at the end of the line at the corner of Reservoir and Main streets. He asked him whether the cross street was Reservoir street. This was about twenty minutes to ten and the driver saw them start down the street towards the reservoir—the scene of the murder. A physician going down the same street about that hour overtook a man and woman going towards the reservoir. The man had on a slouch hat pulled down over his face so as to prevent his being seen. In size and build he corresponded to the prisoner. He asked in a quick and excited manner if that was Reservoir street. The man and woman kept on Reservoir street towards the reservoir. And a woman's cry of distress was heard late that night coming from the direction of the reservoir.

Cluverius arrived at the Davis House at Richmond on March 2 at four in the afternoon. On the night of the 13th he came in about midnight, told the landlord to call him at five the next morning as he had to take a boat and went up

to his room where he ordered a bottle of whiskey sent. On his way home on March 14 he met his father at Centerville in a store and persons there heard the latter remark that he looked tired and asked him how he got the scar on his hand, to which he replied that he got it getting on the train when he threw his hand against the railing to prevent a fall. When he reached Richmond under arrest he told the policeman that it was a "kind of eruption." A witness testified to his efforts in the police court to hide from view the back of the hand upon which were the scratches. His father attempted to account for them by stating that he saw him slip and scratch his hand against a knot-hole in a fence at Centerville when they were starting home. But two physicians who examined his hands in the jail testified that they were not those made by briars or splinters, but such as might have been made by finger nails, and did not think striking against furniture or fence could have made them.

On March 15 near the hole in the fence where the two parties had entered the reservoir grounds, two boys found an odd-shaped gold watch key which several witnesses swore they had seen Cluverius wear on his chain and which a jeweler swore he had once repaired for him.

When the officers went to arrest him at his Aunt's house where he lived, they noticed attached to watch chain a small piece of chain without any key or charm to it; they saw it again at the hotel on the way to Richmond, but when searched the next day it was not there and Cluverius said he had left it with his brother at his Aunt's. The brother later produced it but not before he had had an opportunity to get it from his brother in the jail in Richmond. When arrested he admitted that he had been in Richmond the past two days but denied that he had seen Miss Madison there.

The defense argued that Miss Madison had not been murdered by anyone, but had committed suicide and produced to sustain this theory a letter written by her to her aunt in 1883 in which she said, "O, if suicide were not a sin how soon the lingering spark of my life would vanish, but I will wait God's own time." And the testimony of the conductor of the train

on which she went to Richmond on March 12 when something was said about rapid running, she remarked that she wished the cars would run off the tracks and kill her. And the statement of one of the expert witnesses for the Commonwealth that on Tuesday after the body was found, he was of opinion that it was a case of suicide and not of violence. But when she wrote this letter she had just quarreled with her family. Her rich aunt had sent her to school for a year and her parents had refused to let her finish her course. And the letter contained many other extravagant expressions, such as: "Oh, what a terror my life"; "Oh, how I am struggling"; "Oh, my sad suffering. But I have Jesus to look to. He suffered, too, even death at the hands of the merciless tormentors, and of course he knows my suffering." "Oh, to think of my school, it almost kills me."

The defense tried hard to keep from the jury what was called the "torn note" and the letter that Mrs. Dickerson received, known as the "Curtis" letter. The former, it was argued, was never received by the prisoner and the latter was not connected with him in any way. But the court admitted both.

As to the watch key it denied that it ever belonged to the prisoner, that no one of the witnesses for the Commonwealth swore positively that they had seen him wearing it and that Joel the jeweler was not positive that he was the man that gave him the key to mend and that his aunt swore that he never had such a key and that the only one he wore and had even seen was a key somewhat like it, which was produced in court, and that his brother confirmed this as did four other acquaintances.

The trial lasted twenty-one days, but though the evidence was all circumstantial, the jury did not take long to decide that Cluverius was the murderer of his cousin. On appeal to the Supreme Court the conviction was affirmed, the Chief Justice in an exhaustive opinion reviewing all the evidence and coming to the conclusion without a doubt in his mind, that all the circumstances of time, place, motive, means, opportunity and conduct, concurred in pointing to the prisoner

as the perpetrator of the crime, and must produce a moral, if not absolute certainty of his guilt.

Yet Cluverius denied from the beginning that he was guilty and went to the gallows protesting his innocence.

THE TRIAL.¹

In the Hustings Court, Richmond, Virginia, May, 1885.

HON. THOMAS S. ATKINS,² Judge.

May 11.

The Grand Jury of the City of Richmond on April 6, last, returned an indictment against Thomas J. Cluverius for the murder in said city, on March 13, 1885, of Fannie Lillian Madison. The five counts of the indictment charged, in somewhat different language, the death to have been caused by beating on the head and drowning.

The prisoner being arraigned pleaded *not guilty*.

Charles V. Meredith³ and William R. Aylett,⁴ for the Com-

¹ *Bibliography.* "Lillian Madison's Murder. Petition of ex-Judge and Bev. T. Crump for a New Trial; the Evidence, including Torn Envelopes—as certified by the Clerks of the Court of Appeals and of the Hustings Court of Richmond City. D. M. 32-R. Thomas J. Cluverius vs. Commonwealth of Virginia. From the Hustings Court City of Richmond. The manuscript has been followed by the printer *verbatim*. Johns & Goolsby, Contractors for Printing Records of Court of Appeals at Richmond, 1316-18 Franklin Street, Richmond, Va."

"In the Supreme Court of Appeals of Virginia. T. J. Cluverius v. the Commonwealth. Brief for the State."

"In the Supreme Court of Appeals of Virginia. Thomas J. Cluverius vs. the Commonwealth. Argument for Appellant, in Reply. Wm. W. & Bev. T. Crump. Whittet & Shepperson, Printers, Richmond, Va."

"Cluverius. My Life, Trial and Conviction, By Thomas J. Cluverius. Richmond, Va. Published by S. J. Dudley, 1887." 2d edition enlarged 1887.

"The Richmond Despatch," May 11, 1885, to June 5, 1885; Oct. 16, 1885.

"In the Supreme Court of Appeals of Virginia. Thomas J. Cluverius vs. the Commonwealth. Petition for Rehearing. Whittet & Shepperson, Printers, Richmond, Va."

"The Virginia Tragedy. Trial and Conviction of Thomas J. Cluverius for the murder of Lillian Madison, March 13, 1885. By

monwealth; *William W. Crump*,⁵ *Beverly T. Crump*,⁶ *A. Brown Evans*⁷ and *Henry R. Pollard*⁸ for the Prisoner.

Today the selection of the jurors (begun May 5) was completed and the following were duly sworn: John Kepler, William H. Parker, John P. Heath, William D. Trice, Carter Harrison, S. J. Davis, R. W.

George A. Booker. Richmond, Va. Johns and Goolsby, Book and Job Printers, 1885."

² ATKINS, THOMAS STANLEY (1843-1900). Born in England and came to this country with his parents, who settled in Chesterfield Co., Va.; was educated at private schools and was for some time deputy clerk of the Federal Court at Richmond; studied law there and was admitted to bar, 1875; Judge of Hustings (or Corporation) Court, Richmond, 1882-1888. Afterwards returned to practice and was for some years a Master in Chancery of the United States Circuit Court. Died in Richmond.

³ MEREDITH, CHARLES VIVIAN. Born 1850, Richmond, Va. Admitted to bar 1871; City Atty. Richmond, 1885-1898; Member Va. Constitutional Convention, 1901.

⁴ AYLETT, WILLIAM ROANE (1833-1900). Born and died at "Montville," King William Co., Va., an estate which has remained in the Aylett family since its grant by the Crown to John Aylett in 1658. Great grandson of Patrick Henry through his grandmother Elizabeth Henry, who married Philip Aylett; educated at Rumford Acad. and the University of Va., where he graduated in arts and law. Admitted to bar, 1854, and practiced in King William and adjoining counties until 1861 when he entered the Confederate service as captain of the Taylor Grays, later a part of the 53d Va. Became successively Major and Colonel, and was at the battles of Fredericksburg, Hanover C. H. Seven days Fight around Richmond, Cold Harbor, Gaines Mill, Malvern Hill, Manassas, and Gettysburg where he was wounded. Taken prisoner at Five Forks after being engaged in no less than twenty-two engagements. At close of war returned to his estate and engaged first in farming and afterwards practice of law; acquired a considerable clientele and was Commonwealth atty. for several terms.

⁵ CRUMP, WILLIAM WOOD (1819-1897). Born Richmond, Va.; educated at private school in Richmond; attended William & Mary Coll. 1835 to 1840; graduated in law in latter year; admitted to bar (Richmond) 1840; Judge Circuit Court 1850-1853; resuming practice of law in Richmond upon retirement from Bench; Asst. Sec. Treasury of Confederate States 1864-65; member State Legislature 1866, 1873-74; for many years Rector of the Board of William & Mary Coll. under its colonial charter. Died in Richmond. (See Tyler's Men of Mark in Virginia, vol. 5, p. 77.)

⁶ CRUMP, BEVERLY TUCKER. Born (1854) Richmond, Va. Grad. V. Mil. Inst. 1873; student at Univ. Berlin and Goettingen, 1874-1877; grad. Univ. Virginia, 1877-78; LL. B., 1878; admitted to bar (Rich-

French, J. T. Sherwood, W. T. Herrock, F. A. Howell, C. E. French, and W. H. P. Berkeley.

On May 8, after *R. W. Larke* and *A. S. Goode* had been accepted as jurors, *Mr. Merideth* moved that they be discharged from the panel, because the former had declared that he would not hang a man on circumstantial evidence and the latter had expressed his opinion as to the prisoner's guilt and had made bets on the result of the trial, such facts having come to the knowledge of the Commonwealth since said jurors were accepted.

The following witnesses were then called and sworn:

J. T. Ford: About a week ago in Brown & Elam's store we were talking about this case. Said I could not serve as I had made up my mind. *Mr. Larke* asked me how; I told him from what I had seen in the newspapers. He said I had no right to form an opinion on that; the evidence published was nothing but circumstantial evidence. I said men had been hung on circumstantial evidence; he said he would not hang any man on circumstantial evidence. He then

told of several cases to show that no man ought to be hung on circumstantial evidence.

W. A. Boswell: Was at the store of Brown & Elam when he made the remark testified to by *Mr. Ford*. *Mr. Larke* mentioned several cases of circumstantial evidence and said that he would not under any circumstances hang a man on circumstantial evidence. I understood him to mean that circumstantial evidence was something not seen by an eye witness. Didn't under-

mond), 1878; member State Legislature, 1893-94; member and chairman State Corporation Commission, 1903; resumed practice of law in Richmond, 1907; Judge Law & Equity Court, Richmond, 1911-1920. (See *Tyler's Men of Mark in Virginia*, 1, 281.)

⁷ EVANS, ANDREW BROWNE (1835-1916). Born Middlesex Co., Va. Grad. Columbian Coll. (now George Washington Univ.), 1848; member House of Delegates, Va., 1859-60, 1881-85; Commonwealth Atty. Middlesex Co.; Judge Ninth Judicial Circuit, 1890-1892. Died at his home in Middlesex Co.

⁸ POLLARD, HENRY ROBINSON. Born "Belle Air," King & Queen Co., 1845; grad. Columbian Coll. (now George Washington Univ.) LL. B., 1867; LL. D. (Hon.) Howard Coll., Ala. In Civil War enlisted in Topographical Engineers where he served twelve months, and in Nov., 1864, joined 24th Va. Cavalry (Cary's Brigade); was in retreat with Lee's Army from Richmond to Appomattox C. H. and at the surrender April 19, 1865; Commonwealth Atty. (King & Queen Co.), 1874-76; member Va. House of Delegates, 1881-90; President Baptist Gen. Assembly, 1884-85; President State Democratic Convention, 1887; Special Council for State in settlement of State debt, 1892-96; member Board of Trustees Richmond Coll. and of Foreign Mission Board of South Baptists for over twenty years; City Atty. Richmond, 1898-1900, 1918-20. (See *Confederate Milt. Hist.* 3-1121; *Gen. Alumni Cat. George Washington Univ.* 1917, p. 152.)

stand him to refer particularly to this case.

R. W. Larke: At Brown & Elam's store we got to talking about circumstantial evidence and I narrated some cases to show the danger of convicting a man on circumstantial evidence. May have made the remark as stated by Mr. Boswell and Ford, if they say so. Can't remember positively the words. I spoke in a general way without reference to any particular case and had no more idea at that time of serving on this jury than I did of going to London. I meant that a man ought to be very slow and cautious in convicting on circumstantial evidence. If this case presented an unbroken chain of circumstantial evidence, fully proved, I would convict him if I was convinced. Don't remember having said I would under "no circumstances" hang a man on circumstantial evidence.

I have only just recalled that my birthday was in April, last, my sixtieth, and if it is not too late would like to claim my exemption on that ground.

William Harris: Am a barber. Mr. Goode was shaving in the shop about five weeks ago and said that if they did not stop fooling they would not be able to convict Cluverius. I contended that he would be and Mr. Goode said that he would bet me a ten-cent cigar that he would not be. I said, "All right, I'll take the bet." Don't know whether he was joking or not. I considered it a bet. I would claim the cigar if prisoner is convicted.

Thomas White: Am a barber in Harris' shop. Heard the conversation between Harris and Goode. Harris said he would be convicted and Goode said he would bet him a ten-cent cigar he would not be. Harris took the bet. I don't know whether Goode was joking. It appeared to be a bet. After the bet was made a gentleman in the room remarked that he didn't think he (the speaker) could give the prisoner a fair trial and Goode replied that he thought he (Goode) could.

J. Robinson: Am a policeman. Went in Mr. Goode's store about three or four weeks ago to get a cigar. He offered to bet me fifty cigars that he would not be convicted. I took the bet. Do not know that I would claim the cigars if I should win. No kind of cigars was mentioned; he may have been in fun.

A. S. Goode: Don't recollect anything about the bet with Robinson. Do not deny it if Robinson says I did. May have made it in fun; never bet anything in my life. Remember something about the bet with Harris since he has mentioned it; had forgotten all about it. Don't think I would claim the bet if I won. Guess I would pay the cigar if he claimed it. Have no opinion as to the guilt or innocence of the accused and have no bias either way; can give him a fair trial upon the evidence.

THE COURT ordered the two men to stand aside and discharged them from further service on the panel.

THE WITNESSES FOR THE COMMONWEALTH.

May 13.

Taking of testimony began today and ended on June 1. Arguments of counsel began June 1 and ended June 4.

L. W. Rose: Am keeper of the old Reservoir in this city. On the morning of March 14 went up the embankment and at once noticed the walkway furrowed up with tracks, also on it a red glove and piece of shoe-string; also close to the fence a woman's footprint and back of it a man's. Then saw floating on the water a woman's dress and one leg jutting up. Called Lucas and then notified the coroner. The tracks indicated a scuffle. There is a small gate in the fence east and on the south there was a hole in the fence made by some planks having come off; from this hole you cross a ditch on a plank. Back east of the Reservoir is the Small-pox Hospital on the Clarke Spring property.

The tracks looked fresh. It had rained a little and walkway somewhat soft. After body had been out of water I noticed a swelling over one eye and a bloody spot on the forehead. There is a path from the hole in the fence to the steps that lead up to the embankment; another path very little used runs from the hole in the fence to the waste water pipe. It requires some exertion to walk up the embankment; the outside fence is about eight feet high; my house is on the N. W. corner of the grounds; all the family went to bed early that night and none of us heard any cry.

R. G. Lucas: Am foreman at waterworks. On morning 14th

March Mr. Rose called to me. Saw a glove and piece of shoe-string lying on the embankment where it looked there had been a desperate struggle. Right opposite in the water, something like a dress. Raised it with a pole, saw a leg and knew there was a body. It was not moved till coroner came out. Saw a swelling over the eye where there was a bruise and her mouth was swollen some. Seemed to be tracks of a man and a lady. Picket gate around the water was shut that morning.

J. W. Trainham: Working under Mr. Lucas on the morning body was found; saw ground on walkway ruffled up just opposite where body lay in the water. Saw tracks leading from hole in the fence to the bottom of embankment. Judged them to be tracks of lady and gentleman, because one larger than the other. There were not any other tracks along there but those two; they seemed not to have been made very long before; seemed to be tracks of persons walking side by side.

Wm. Hutcheson: Working under Mr. Lewis that morning. Saw where the ground was disturbed on top of embankment and tracks across from direction of the hole in the fence over to the embankment. Seemed to be tracks of male and female; they continued on up the embankment; seemed to be close together.

Dr. Wm. H. Taylor: Am corner of Richmond. On morning of 14th March found the body in the reservoir. About halfway along the pathway there were a number of footprints. Seemed to be those of a small-shoed person, running into each other in a confused fashion, except two heel tracks made by a very different shoe from those that made the other impressions. The heel tracks were made by a large, broad-heeled shoe. Subsequently took a shoe from the foot of the deceased and tried it in some of the tracks; it fitted satisfactorily. Body was covered with mud; fingers tightly clinched; face had a placid look; some trifling abrasions on her face and a slight bruising of the lower lip; a handkerchief around her neck, fastened with a pin in front. There was no name upon her clothing and nothing about her except a pocket-handkerchief — no earrings, finger rings or other jewelry. Her hair was neatly done up behind and still securely fastened by hair-pins. A postmortem was made. There was a swelling on her forehead, scrapings on the right eye-lid. Just above the nose scratches and above the eye another one—five in all. The left half of the lower lip was slightly bruised. There was no injury of the skull. In lungs found a very little frothy water—considered sign of drowning. Cannot say there was any water in the stomach; about a handful of partly digested food; water in stomach considered sign of drowning. In the womb found a male child at about its eighth month. Found the heart containing blood. Flush of blood on the brain could be caused by three things—counter-

stroke, a blow propagated through the brain, breaking of blood-vessel from the shock of drowning, or from a blow on the head at point leaving no external mark. The bruise on the hip could have been caused by a slight blow or pressure. Would ascribe her death to drowning, preceded by partial insensibility, which prevented swallowing much water.

Dr. Pettus assisted me in the postmortem. Said on Tuesday after body was found that to my mind it was a case of suicide and not of violence. This was based not only on the postmortem examination, but on other alleged facts, as the finding of the shawl on Dunstan's fence. That opinion is not the one I hold now. Putting the medical facts with these other alleged facts, as an individual, not as an expert, I was strongly inclined to suicide; they do not prove it, either for or against it. A woman in pregnancy is more liable to be affected by a blow. The effect on the brain might have been produced by a blow after death—by a heavy blow. It would have required a harder blow than while a person was living.

Jackson Bolton: Am assistant engineer. The morning of 14th March saw two tracks, one of male and one of female, from the hole in the fence to the foot of the embankment; saw the tracks of a man only along the slope of the embankment—saw no track of woman along the embankment—the tracks were lost from the waste-pipe until I saw the man's track ascending the embankment—appeared to be same track as that below. The tracks lead along the ditch side by side. The man's

track up the embankment lead to the point where the ground had been broken up. The man's tracks were very flat and had a flat, broad heel.

A. W. Hargrove: With Mr. Bolton morning of 14th March. We traced the tracks from the hole in the fence to the bank where the slope starts. Saw two tracks of male and of female going along ditch to that point, side by side. It was cold that morning, clear. It had rained and snowed the day and evening before, but not during the night.

R. R. Dunstan: Am blacksmith. Reside at 103 Reservoir street—just below Carey street, about one-half mile from the reservoir. On morning of 14th March, before sunrise, I saw a red shawl hanging on my front fence. This looks like the shawl. Mr. John Wren sent after it.

E. J. Archer: Slept night of 13th March in one of the buildings on the Clarke-Spring property. On morning of 14th March found a glove and a veil at the hole in the reservoir fence. (A glove and a veil shown witness, he identifies them.) I gave them to Mr. Rose that evening. Retired Friday night about nine; the least thing wakes me up. Heard no noise that night. Saw no foot-prints near where glove and veil were. It was a cold night, the 13th.

J. J. Walton: Am police officer. Was with Policeman Saunders on 17th March. We found a hat in one of the wards of the small-pox hospital on the Clarke-Spring property; we saw it through the window. The door was locked; nearly all the glass was broken out of the window and some of the frames gone. It was a black

straw hat, with two black plumes in it, and beads on the inner with a velveteen binding. (A hat being shown to the witness he identified it as the same hat.)

C. W. Saunders: Affirmed last witness' testimony.

John Williams: Am eleven years old. On Sunday morning after the body was found was at the reservoir with my brother Charlie and another boy, Willie Thurston. At the southern fence Willie pulled a plank off. I put my head in and saw a watch key close beside the fence; I picked it up and carried it home and gave it to my mother. (Watch key being shown witness he said it was the same key.) Walter Hill carried it down to Mr. Wren's and he carried it to a jeweler.

Isaac Williams: Am father of Johnny Williams. My little boy brought me a watch key on Sunday between one and three o'clock. It represented on top a shell, on top of that a loop like two shells scalloped. There was a gold wire ring which attached it to a chain. Gave the key to my wife (yes, sir, that is the key). The key was bright and not at all tarnished.

Charles Williams: (Affirmed his brother's testimony and identified the key.) I was with my little brother Johnny and Willie Thurston on the Sunday after the body was found, when Johnny found the key about one o'clock. He found it on the right-hand side of the gulley, inside the fence. Willie Thurston pulled a plank aside and my little brother stuck his head in and picked up the key. It had a split-ring or wire attached it; it looked like a gold key.

Jos. R. Mountcastle, John B. Childress, J. D. Redwood, Robert J. Waddell testified that a bag and a shawl strapped around it was found floating about two miles below Mayo's bridge, by the coal-wharves about seven, March 14. It contained articles of female dress, mostly underclothing, some needle work and paper in a cigar box and a pair of knit

mitten gloves. One piece of underclothing had three initials on it; another piece had F. L. or T. L. Madison. The bundle was turned over to Dr. Taylor, the coroner. (A bundle and its contents were exhibited in court and identified.)

Mrs. Anna Williams identified the key.

Mr. Meredith moved that there be a recess of the Court; that the reservoir grounds be inspected by the jury, which was ordered by the Court.

The jury, accompanied by the Judge, the counsel, the prisoner, and the officers of the Court, were then taken in carriages. Other conveyances following with reporters and members of the prisoner's family. At the Dunstan house the whole party alighted and Judge Atkins said (it having been agreed that no one but the Judge should speak to the jury): "Gentlemen, this is the Dunstan house." They then drove to the reservoir where the Judge pointed out the different parts referred to by the witnesses. After visiting the hospital, the party returned to the Court House after an absence of nearly two hours.

Walter Hill: On Monday, 16th March, got a watch key from Mrs. Williams. Gave the key to Mr. Wren, outside his office. (Watch key being shown to witness he said it was one exactly like that.)

B. P. Owen: Am connected with the "State" newspaper. On 16th March went to Mr. Wren's office to get any news for my paper about the reservoir matter. He showed me a watch key. Went with him to Mr. Spot's. (Witness shown the key.) That seems to be the key.

Charles Spot, Jr.: Am a jeweler. Mr. Wren brought me a gold-filled watch key. Is of an old style; top looks like a shell; has two pieces that look like a shell; there is a ring on top of the key and a little split-ring attached to it that was bent all

out of shape. (Being shown to witness) That is the key.

Sam'l B. Witt: Am Commonwealth's attorney. Mr. Wren turned over to me 17th March a watch key. Gave it to Mr. Richardson, the police justice. During the week gave it to Mr. Wren to show in the jewelry stores and see if any one had sold a key like that recently. (Being shown witness) It looks like the same key.

John Walker: Reside in King William county. Am uncle of Fanny L. Madison and first cousin of the prisoner who resides at Little Plymouth with his aunt, Mrs. Jane Tunstall. Fanny L. Madison lived with her father and mother until about two or three months before she went to Bath county, which months she stayed with her grandfather, my

father, whose house is about one mile distant from her father's. In Richmond I saw and identified a dead body as that of my niece, Fanny Lillian Madison. Of her identity I am positive.

Prisoner came to my father's house where my niece was after she left her father's on 10th July last, on his way to attend a warrant-trying at "Aylett's." Living in the house with my father besides myself and Miss Madison was my mother and a small white boy, crippled and infirm. That night prisoner slept in my room —am not positive that he was in a separate bed. Do not know whether he got up from his bed that night or not. Next morning about eight I went to Aylett's with him to the warrant-trial. That morning after I had attended to my milking and stabling I called the prisoner about half an hour by sun. Don't think he had got up until I called him. He was again at father's August 25. After dinner he took Lillian to ride in his buggy on a visit to my sister, Mrs. Hilliard, and returned half an hour before sundown. That night the prisoner slept in the same room with me. Before he went to bed he said, "I believe my bowels have gotten out of place and I am afraid I shall have to get up tonight." I said, "Do you want anything to take?" He replied, "No, I believe it will wear off." Some time in the night he woke me up, dressing. I said, "Tommie, what is the matter? Shall I light the lamp?" and he said, "No." I said, "Let me go with you," and he replied, "No, I know the way down just as well as you do, and there ain't any use for both of us going." He went out without the

lamp being lighted, and I fell asleep at once and did not hear which way he went. When he returned I said, "Did you find the way out?" and he replied, "Oh, yes, I got out all right." I do not know how long he was absent. Next morning I asked him how he was and he said, "Very well." He left for home after breakfast. Next time he came was September. He got there about sunset. Father and mother and Lillian were there. He did not go out to my knowledge that night. Before retiring he said, "He was afraid his bowels would get out of place again, and that it seemed strange whenever he came there his bowels got out of order." I paid very little attention to what he said. He has never been there since. During his visits Lillian occupied a room on the west side of the house and my room was in the east end. There was both a passage way and room between my room and hers. Father and mother slept in a room on the first floor immediately under the room occupied by Lillian. There were no locks on the doors, but old fashioned latches, moved by a string outside the doors. He was in the habit of visiting my father's house. Am not certain he visited there more frequently after Lillian came than before. I think he did. Don't think she had any male visitors, young or old. She would walk around with the prisoner when he was there. He was perfectly at home.

At Mrs. Tunstall's, latter part of January, he had on a gold chain; he had been in the habit of wearing a black guard. I said to him, "Hello, judge, you have

made a raise." He says, "I bought it when I was over in Richmond the other day, at the sale of Mitchell & Tyler." He had a little piece of chain attached to the button-hole; a key was attached to that about an inch long; it had a little raise in the middle and a ring in the centre, then another raise between that and the head. (Watch key shown to witness.) This looks much like the key. Prisoner is a lawyer; was at Richmond College two sessions, I think. Several times before Lillian came to our house to stay he brought her over there from her fathers' house in his buggy and they both stayed all night. They were second cousins; seemed to be right smartly attached to each other. Don't know why she came to our house to live—seems they had some little misunderstanding at home about some letters. I have no reason to believe he went out of my room that July night. I don't think he got up until I called him. Went with him to Aylett's next morning and he brought me home and went on to Rumford. At the August Court he came again. Another niece of mine, Nannie Hilliard, was with me then and she slept with Lillian. Apart from being paralyzed, my father is in right good health; hardly ever leaves his room. There was some difficulty between my father's family and Mr. Madison's about Lillian coming here. Since Lillian's death they have been on good terms. At the September Court he came again at my invitation, but left next morning before I did.

Lillie lived at Mrs. Tunstall's about two years, when she was

15 or 16 and went to school there.

M. Gatewood: Live in Aylett's; am postmaster. Saw prisoner there last July at a trial; was within five feet of him. When he got up to make a speech noticed he had a watch key on a black guard—a little gold key. (Watch key shown witness.) As far as I know that is the key. Am not willing to swear the key I saw was just like this one.

Cross-examined: Don't remember to have noticed watch key of any one else. Noticed him because it was the first time I had ever seen him and he was a new lawyer.

John Wren: Am a detective. Walter Hill brought me a red worsted shawl, also a watch key. Gave the key and shawl to the Commonwealth's attorney next day.

Claggett Jones: Knew Fanny L. Madison by sight. Saw her every Sunday at church while she was attending Dr. Garlick's school. Saw her last at the Exchange Hotel 6th of January, 1885, at the Clerk's desk. She wore a red crochet shawl.

A. W. Archer: Am clerk at the Exchange Hotel. There was no Miss Madison registered there on 5th, 6th or 7th of last January. Saw prisoner there on 6th of January. He came in, ran his hand down the register and asked if this lady was in; he meant occupant of room 66. Miss F. L. Merton was registered as occupying room 66. She registered on afternoon of 5th from Roanoke City. Have seen the prisoner once since that in the jail; had some conversation with him;

cannot remember what I asked him accurately.

THE COURT: State it as nearly as you can.

Witness: I do not like to do that. I cannot recall the conversation.

Mr. Meredith: Do you remember whether you asked him if he had ever seen you before?

Objected to. Overruled.

Witness: I remember asking him that; he said he had never seen me. Told him I had seen him at the hotel; said he had not been there on that occasion. She was not in her room when he called and I told him so and he walked off. Did not notice where he went.

Mr. Meredith: Do you remember whether at the jail you had any conversation with him or not about when he had last seen Miss Madison?

Mr. Archer: No, I cannot recall that part.

Mr. Meredith: You do not remember that?

Witness: I do not remember that at all.

Cross-examined: Went to jail to see if he was the person who called January 6. Had before described him as having light hair and a slight mustache. Found Cluverius had no mustache, but he had light hair. Found to the best of my knowledge and belief he was the man. Only saw him a minute or two in January; had never seen him before. He appeared indifferent as to whether Miss Merton was in or not. Arrivals at the hotel average about 30 a day.

Henriette Winbush (cld): Was chambermaid at Exchange Hotel

on 6th January. Prisoner came upstairs and asked me if lady in 66 was in. Told her a gentleman wanted to see her. She and the gentleman talked in the hall a good while, then he went downstairs and she went in her room. He came back again in about two hours. He tapped at her door; they stood kind of in the door and talked. Saw him there again late in the afternoon; they were standing in the hallway. He said, "I'll wait for you in the parlor," and he went downstairs. Went into her room about eight o'clock that evening; she was not there; her bed had not been disturbed.

Ella Madison: Am first cousin of deceased. She came to Richmond on 10th October at her aunt's, where I was. She was not at my aunt's in January. Did not spend the night of the 6th of January there.

E. C. Jones: Live in Richmond; am first cousin to deceased, Fannie Lillian Madison. On night of 6th January she was not at my house.

D. C. Richardson: Am a police justice; took charge of the deceased's trunk and examined it; it contained letters, envelopes, photographs, clothing and other articles. (The letters introduced in evidence, a lewd poem alleged to be in prisoner's handwriting, several articles of dress were among the contents, identified by the witness.)

W. R. Quarles and James D. Craig, bank clerks, who were accustomed to study handwriting, testified that in their opinion the letters to the deceased introduced in evidence by the Commonwealth, likewise the lewd poem were written by the prisoner.

A. B. Cauthorn: In early part of January last after breakfast saw prisoner in front of the ladies' entrance of Exchange Hotel.

Mrs. Margaret A. Dickerson: Live in Bath. Fanny Lillian Madison was employed by me as a teacher on my farm from 16th October, 1884, to 12th March, 1885. Recognize the wearing apparel shown me as hers—namely a red shawl, a hat of black straw with ostrich feathers, a blue veil, a pair of garnet-colored gloves, a pair of home-made mittens, the bag found in the river, a tan-colored dress taken from the said bag, a blue Jersey and an alpaca dress. The bag found in the river I gave to her. Saw the letter she received 10th March, before it was handed her; envelope was white. On 5th January last she told me that she had received a letter, that poor Aunt Jane was not expected to live and she would like to see her again, and that Cousin Tommie would meet her at Richmond. She left that evening and when she came back she said that he had met her there.

Her spirits were sometimes depressed. Nephew Willie generally walked to the school house, about 500 yards; they crossed the river in a little boat to get to the school-house. Rode horseback to her cousin's and to church; when she did my nephew Willie accompanied her.

Cross-examined: The conduct of deceased when in Bath was faultless. We were much attached to her. She most always had one of the children sleep with her. Did not consider her a brave woman.

Mr. Meredith: Do you know what was the cause of Miss Madison coming to the city of Richmond? A. Receiving that letter on March 10. She brought the letter in and read it to me.

Mr. Meredith offered the letter.

Mr. Crump: We object to the introduction of the letter.

THE COURT said that he would permit the letter to be read as a part of the statement made by Miss Madison to the witness as explanation and preparation of leaving her home in Bath county for Richmond.

Richmond, Va., March 9th, 1885.

My Dear Lillie:

It is on business of sad importance I must write to you to-day, as you know mama, both mama and Aunt Mary have both been in wretched health for a long time, and both have been getting worse for some time, and the Drs. say if Aunt Mary don't leave here, and that soon, she cannot stand it long, so they advise papa to take her to Old Pt. in order that she can take those sun baths which are proving so beneficial to consumptives; but she will not agree to go unless I could go with her, which, of course, is out of the question, as mama is too ill for me to leave her; so we have been trying to persuade her to let some one else accompany her. So at last she agrees that if we can get you to come down and go with her she will consent to go. Of course we told her you were teaching, but she begged we would try to get you to come and go with her just

as company for her, as her nurse will go with her who has been waiting on *on* her all the time. She says the reason she wants you to be with her is on account of your being so quiet and gentle in your manners when you were visiting us, and she is so nervous she could not bear to have some one with her who was not gentle and kind. She told me to beg you please to grant her this request, as it was her last resort for momentary relief from her sufferings, as of course we know she can never be well. My dear Lillie, imagine how it is with me—my dear mama and aunt both so sick. Mama is rapidly declining, I think, and aunt worse, I think, but if she can get to Old Point we hope she will get better. She will only stay there one week, as in that time the doctors think she will be better, if it will benefit her at all. Lillie, please come. Ask Mrs. Dickerson I say please excuse you under these sad circumstances, just for a week, and she will do it I know, as you wrote me she was so good and kind. Papa wishes me to say to you, if you will come and go with aunt, he will never forget your kindness, and besides, he will pay all your expenses and \$2.00 per day for every day you are with her. He is such a devoted brother to her he would do anything in his power. Lillie, don't get any dresses for the purpose, as you and myself wear the same clothes, and as we wanted, if possible, to attend the exposition, I have had made up a lot of new clothes for the purpose, but, of course, now we can't go, but we were in hopes mama and aunt would get better, so we could go, but we have given it out now. Now, dear Lillie, we are in hopes to see you soon. If you will accompany aunt, come Thursday (12), either on the mail or express; we shall send to meet you, and please, dear Lillie, don't disappoint us, for you know there is nothing I would not do for you. If aunt should get too ill to go we will telegraph to you so you will get it before time for you to start the 12th. If you will ask the lady you teach for to excuse you for just this short time she will do it I know. All send much love; aunt is very nervous today.

Ever your loving schoolmate,

LAURA M. CURTIS.

Mrs. Dickerson: When she showed me the letter she had a net also in her hand. She didn't have a watch. Never saw or heard of her wearing a watch key. She often spoke of letters she received from her cousin Tommie and occasionally speaking of him as Cousin Tommie Cluverius. Never heard her mention name of any other gentleman or say that she got letters from any other gentleman.

J. L. Oliver: Am county jailor. Executed a search warrant on

house of Mrs. Tunstall and office of King & Queen county.

Emmet Richardson: Came to Richmond with prisoner on 12th March on railroad. He wore light overcoat and a black slouch hat.

James M. Guthrie: Am assistant postmaster at Little Plymouth. Have seen mailed there two or three letters directed in handwriting of prisoner to Miss F. L. Madison, Bath County.

Willie Dickerson: Live in Bath County with my aunt, Mrs. Dickerson. During March I got a let-

ter from the postoffice for Miss Madison. Last one I carried her was the day before she left; it was in a plain white envelope. Have seen Miss Madison have a watch key—a plain steel key. She kept the key in her trunk; it had one ring.

John D. Foster: Am judge of county court of King William. Knew prisoner as one of the practitioners. Have seen prisoner with a key on his watch guard—a small gold watch key with ring in center and raised crown head. (Key shown to witness.) This has a general resemblance to the key; can't testify that it is the identical key.

W. H. Madison: Am first cousin of Fannie Lillian Madison. She spent one night at my house on her way to Bath; the last time she was there. Did not spend the night of 6th January there.

Laura M. Curtis: (Letter marked No. 8 shown to witness.) This is not my handwriting; I never wrote it. Looks like Lillian's; can't swear it is. I was her room-mate and bed-mate at school.

R. H. Curtis: Am brother of Miss Laura Curtis. (Letter shown to witness.) Did not sent this letter; never wrote her a note.

C. J. Madison: Am father of deceased. Recognize the name on Exchange Hotel register of January 5, "Miss F. L. Merton, Roanoke City" as that of my daughter. The same name, "Miss F. L. Merton" on the register of the American Hotel.

(Note identified by Dodson shown to witness.) That is my daughter's handwriting, I have no doubt about it. (Curtis' letter shown to him.) I am not certain

that this is my daughter's handwriting. That is a photograph of my daughter.

Geo. Wright: Am conductor on C. & O. Railway. On 12th March a young lady got on my train at Millboro—told me her name was Fannie Lillian Madison. She was going to Richmond to see a sick friend; that she would stop at the American Hotel. She had on a red shawl, blue Jersey and red mittens on her hands. She said she wished the cars would run off and kill her, when something was said about rapid running. Did not know whether she was joking or not. She was a short, stout woman—didn't notice that she was pregnant. She seemed in good spirits.

William Martin: Live in Manchester; am Justice of the Peace. Came to Richmond on the 13th March. On the foot-bridge leading to Belle Isle met a lady and gentleman. Heard the man make some remark—heard her reply, "Why, Cousin Tommie!" Prisoner looks very much like the man. He looked then a little fuller in the face; was about his size and general appearance, but can't swear he is the man. Woman was a low chunky woman with dark clothes, except a red shawl. As soon as Belle Isle men were reported as having been down to identify prisoner, the incident was recalled to my mind. Met them about twelve o'clock in the day. Man had on a light overcoat and dark, soft felt hat. Don't remember whether he had mustache.

Charles Isaacs: On 13th March saw a lady and gentleman on Belle Isle; passed within ten steps of them. Saw body at almshouse; am quite certain it was

that of lady I saw on Belle Isle. Am confident prisoner is the man. Don't know how he was dressed. He had on a dark hat; a kind of light mustache; lady had on dark dress; a red shawl on her arm. Thought it was no place for one in her condition—she ought to be at home.

D. V. Morton: Am paying teller at Planters' National Bank. Prisoner was at bank on 13th March between eleven and one o'clock and cashed a check for \$3.00. My impression is that he had a slight mustache.

Benj. Earp: Am nailer on Belle Isle. On March 13 a woman and a man came up—man asked me if they could go in the works; told him, yes. He had on a light overcoat and small satchel in his hand. Lady wore a dark dress. Went down to the jail on 28th. Could not have picked the man out, but after I seen the man I knew it was him, and of course his face appeared familiar to me. Prisoner looks like the man, but he had a small mustache then. The lady was short and chunky and I took them for country people. It was just before we stopped for dinner.

Wm. Kidd: Have charge of machines on Belle Isle. Saw visitors there on March 13—a lady and gentleman on platform of nail factory. Prisoner resembles the man I saw; is about the same size, but wouldn't swear he is the same man, because I didn't take notice enough for that. He had on a light overcoat; had on a dark hat—think it was a slouch hat. I went down to jail, prisoner was standing in line with other prisoners. Picked him out as the man I saw on Belle Isle.

Had a mustache, a satchel in his hand.

T. A. Spencer: Am bookkeeper in the Planters' National Bank. On 13th March, last, prisoner came in to cash a check between the hours of eleven and one. Don't think he had a mustache, if he had it was very slight, hardly noticeable. Am under the impression he was clean shaved.

James Thompson (old): Work on Belle Isle as fireman. On 13th March 12, just before dinner, a lady and gentleman came through the factory. Had a piece of heated iron in my hand to carry to nail machines, and touched them both to get them to stand aside. Prisoner is the man I saw, am confident. He had then a thin mustache, a small satchel in his hand. Lady was short and chunky and had a rosy face. I picked him out at the jail from among the other prisoners; no one assisted me.

Thomas E. Bethel: Am nailer on Belle Isle. Five minutes before dinner saw a lady and gentleman; struck me she looked very solemn, sad. Don't remember her clothing—think she had a shawl of a red color. I went down to jail with others from Belle Isle to look at the prisoner and picked him out without assistance; won't swear he is the man, but he certainly resembles him very much. Man wore a scarf around his neck; remember he had a mustache, but he looked as if he had just come out of a barber shop; had a satchel in his hand.

Joseph Perkins: Work on Belle Isle. Between 12:20 and 12:30, 13th March saw a man and a woman standing near my machine. I noticed her pregnant

condition and said to Mr. Bethel: "That woman had better be at home fixing her bed." The lady was a low, heavy set woman; man had his overcoat collar turned up. He had on a black slouch hat; he had a fuzzy mustache—what I might call a fuzz

on his upper lip. They looked like country people. The prisoner is the man. I went down to jail and recognized him without his being pointed out to me.

Mr. Meredith read the following letter:

Tappahannock, Va.,

Sept. 14th, 1884.

Dear Lillie:

I feel really ashamed for not having written to you and I think you ought to feel more so for not having written to me, for you have nothing in the world to keep you from writing, and I am so busy I have not time to do any thing. I am just out a spell of sickness that kept me from coming up to King William Friday; I certainly wanted to come as 't the 2nd Friday.

your
aling

just as soon as you get this and a long letter, &c. Miss Bell Bland has gotten very much better and I hope she will be entirely well very soon.

I reckon you will wonder what I am doing here. I got here this evening. This makes twice I have been here within the last two weeks. I went to Richmond yesterday week after Aunt Jane; did not stay but one night. I did wish so much you had been over there. What a time we would have had. The theatre was open.

When do

pect to go

in our
sick
and

Mrs. Bray were all sick in bed Sunday and yesterday. I don't know how they are to-day. John Abrahams came down on the boat last Thursday to see Aunt Jane; went back same day.

You remember you have never written that letter you have been promising so long. Now, lets have it.

I don't want to wait a single day for a letter from you after you get this. Well, I must close this letter, as I am tired. Pen is very bad.

Write soon.

Your fond friend,

T. J. CLUVERIUS.

P. S.—When are you and that fellow going to be married? You know you told me it would be this winter. I think it would be the best thing for you; so do this winter.

Mr. Meredith offered the poem found in the deceased's trunk and which had been shown to be in the prisoner's handwriting. As it would be unfit to read it aloud he asked that it be handed to the jury to be read by them.

The jury thereupon retired to read the poem in their room.

Mary Curtis: Live with Mrs. Goss; she keeps a cigar store. 14th of March used to see him at Miss Lizzie Bank's; she kept a house of bad repute; saw him also on the 13th day of March at Mrs. Goss.' She has rooms back, that if any one chooses to come there she will rent them. He came in first alone; in a few moments a young lady came in after him. She had on a blue jacket, a red crochet shawl and was very heavily veiled with a blue veil and a dark hat with black feathers. Never saw the young lady's face. He says to Mrs. Goss, "Mrs. Goss, do you know me?" Mrs. Goss says, "No, I don't recognize you." I says, "I know you very well, because I have seen you in my room privately when I boarded with Lizzie Banks." He used to come there off and on frequently and visit the house; have heard Miss Lizzie Banks say he used to come there before I ever went there. He came there just as any other young man would; there were girls there and he came to see them just the same as anyone else would. On 13th March they went in the back room and stayed about 15 minutes.

Clara Anderson: Was at Mrs. Goss' on 13th March. Saw a gentleman and lady. He had on a darkish coat and a black slouch hat—only saw the back of it. The lady I had seen before in January at seven o'clock at night

going out, a man after her. He came out of the room where he was with her. In January she had on a dark dress and a red shawl and a blue veil. In March she had on the same clothes. I only saw her as she passed out, but I recognized her as the same lady who was there in January. Did not see the gentleman's face.

Cross-examined: Knew it was the same person I saw in January by the same clothes. Saw the lady's face in January. Got a glimpse of her as she was going out in March

Charles Madison (recalled): Prisoner is first cousin of my wife. At my house, in going to Lillie's room you would have to go through mine. Knew nothing of any special beau she had besides the prisoner or about any attentions from any other young men while she was at Walker's. I regarded the prisoner and Lillie as lovers and had for some months. Did not know that Cluverius was engaged to another young lady or that my daughter knew it.

Morgan Treat: Was in Richmond on 13th March; stopped at the American Hotel. Saw prisoner coming in the hotel evening of March 13 about eight, and go up to the register. Don't remember whether he had a mustache. Was sitting near the door and feeling a gust of wind I looked up. Am not positive it was he, but that is my impression.

Alfred R. James: Live in Richmond. Prisoner came into my office some time this year—I think it was in January—and asked me if I had claims or any business in his section to attend to. Am under the impression, which I do not state as a fact, that he handed me a card.

Mr. W. W. Crump: We must object to any statement of impression.

Mr. Meredith: State whether it is your recollection or not. A. It is my recollection. Q. Is that what you mean by impression? A. I mean I am not positive on that, but it is my recollection.

Mr. W. W. Crump: The witness says he has an impression that so and so. That is not evidence and ought not to be given.

Mr. Meredith: I asked him whether he meant by the word "impression" his recollection and he said he did.

THE COURT: State what your recollection is. If you have any recollection upon the subject state it.

Mr. W. W. Crump: We object to his statement of impression.

THE COURT: Strike out his former statement.

Mr. Meredith: I do not think this thing ought to be done. It is not everybody who can draw a distinction between the synonyms of the English language.

THE COURT: Ask him what is his best recollection.

Mr. W. W. Crump: Before that is done, we want to know what sort of evidence he is going to give. Now the witness begins with "I have an impression so and so." Then he is asked by the other side whether he meant by that, "to the best of his recollection," and he says, "yes." Well, of course, that is so. An impression is to the best of a man's recollection, and if all the recollection he has amounts only to an impression, that impression is not evidence and ought not to be given. To call that another name, and to say it is the best of his recollection, does not make it evidence. It amounts to no more than impression.

Mr. Crump: My motion is, not to permit the witness to give his impressions. He begins by saying, "My impression is so and so;" and while that is the best of his recollection, it is an impression, and therefore ought not to be heard. Therefore we object to anything which rests in his mind as a mere impression in place of a fact.

THE COURT: The witness must not state anything that is not based on his recollection.

Mr. W. W. Crump: We object to his testifying as to the matter he is about to speak of after his having said that it was an impression only.

Mr. Aylett: We are willing to withdraw the questions and start over again.

Mr. Crump: You cannot withdraw them.

THE COURT: I think from the explanation the witness can testify; just note an exception.

Mr. Meredith: Your honor will have some difficulty if you do not decide now. Is there any specific objection, or is it an objection to the witness testifying in the future?

Mr. W. W. Crump: The objection is this: He is put on the stand, and is about to testify and to speak of something. I do not know and do not care what it is; but he begins by saying in reference to that matter, "I have an impression so and so," and is about to give his evidence. Well, we object to his giving anything in the

shape of so-called testimony, when he himself admits that that which is upon his mind is no more than an impression.

Mr. Meredith: Then, do you object to my last question?

Mr. W. W. Crump: I object to the witness testifying at all as to the subject matter of which he said when he first answered that he had but an impression.

Mr. Meredith: I wish to call your honor's attention to the fact that I have asked counsel as to whether they object to the last question and they do not answer that inquiry; and therefore it is just one of those general objections that does not amount to anything. They are objecting to the witness testifying.

THE COURT: Have you any recollection upon the subject? I have a recollection, sir, but as I stated before, there are so many people coming in my office I could not positively say that it is so. But that is my recollection. I have met with hundreds of people in the office since then and a good many of them always newspaper men.

THE COURT: You can go on and state then.

Mr. James: My recollection is this: That sometime this year Mr. Cluverius came into my office with some one, I do not recollect who, and asked me about legal business—if I had any legal business in King & Queen and King William and those lower counties. I replied to him that Mr. Pollard attended to my business down there and had attended to it constantly and I did not need to have anyone else. That is my first recollection of Mr. Cluverius. Cannot say positively whether he handed me a card or not. The next time I saw him was on the morning of 13th March. I met Mr. Pollard and Mr. Cluverius. I stopped Mr. Pollard. Mr. Cluverius, to the best of my knowledge and recollection, was with him; he looks to me like the gentleman now. Mr. Pollard stopped to shake hands

with me and this gentleman, Mr. Cluverius, stood a little way off to one side. The next time was on the American Hotel corner with a lady, looking down the street like he was looking for a street car. Noticed that she had a very pleasant face and was neatly dressed; was short and thick set—was in a laughing mood. The gentleman was also well dressed. I thought at first it was a gentleman I knew named Harold, but a second look dispelled that idea. There was something red on her person but whereabouts and whether it was a cravat or shawl, cannot say.

Mr. Meredith: Will you look at that photograph and tell whether that is the lady you saw or not?

Mr. Crump: We object; that photograph was taken in 1882.

THE COURT: The photograph has been admitted as evidence and the witness has a right to look at it.

Mr. James: That appears to be a very good likeness of the lady I saw.

W. F. Dillard: Am night clerk at American Hotel. Was on duty the night of 13th March. A gentleman called to see the occupant of room 21 between 8 and 8:30 o'clock. Called the porter to send his card up. Mr. Dodson, the proprietor, was behind the coun-

ter when the young man was there. Subsequently I saw him in the jail; recognized him as the man. He had a slight mustache; don't remember its color or the color of his hair or of his eyes. He had a light colored overcoat and a slouch hat. Had never seen him before. Did not notice the name on the card. While I will not swear he is the man, I feel quite sure of it.

William Tyler (cld): Was night watchman at the American Hotel 13th March. It was on Friday night. This gentleman came in about half-past eight o'clock. The clerk says: "William, take this card and show this gentleman to the parlor and tell the lady in 21 the gentleman in the parlor wants to see her." I took the card; one of the servants told me she was out. Turned back to the parlor and met the young lady and an old gentleman coming up the steps of the ladies' entrance. They walked in the parlor. The old gentleman sat down by the door and says, "Here's a lady—" Then he asked me could she get a room? I told him yes. This young man and lady and the old man all got up and passed out. As the young man passed me in the hall he says, "I don't think that is the lady I want to see. The young lady I wanted to see went to school with my sister." I carried the lady on to her room and the young man went on down the steps. I told the lady, "When this young man came in he wanted to see you and now he says he didn't want to see you but wanted to see the lady who went to school with his sister." She asked me where was the young man; she asked me was

he gone. I told her I would go to the office and ask. I went to the office and about 15 minutes afterwards he came in again. He seemed to be very restless. I went up to him and says, "This young lady wants to see you; she says you were to come after her this morning." He says, "Where is the young lady? Show me to the parlor." And I showed him to the parlor and carried the young lady to the parlor, and there I left them. It was about twenty minutes to nine then.

That is the gentleman I showed to the parlor. In her room I saw a watch key exactly like the one shown me. She had a little pocket-book in her hand, or hand satchel. Don't know what I did with the card; think I tore it up. I turned the gas out in her room at half past twelve; she was not there then.

William H. Gratton (cld): Worked during last March at the American Hotel. On 13th March saw the lady who was occupying 21; she was coming up the steps when I seen her with a gentleman, I don't know who he was. Tyler was with them.

William Tucker (cld): I drove a tug-horse—an extra horse—to the street cars last March. Prisoner hollered for it to stop and I stopped the car. He was with a young lady; she had a red shawl around her shoulders and he had a satchel in his hand. He had on a light overcoat. The driver of the car is Tom Williams. When I stopped the car they were about two or three doors beyond the hotel.

Cross-examined: He had light hair; had on a light greyish overcoat; couldn't tell you whether it was reversible or not. I think

it was Friday night. I don't recollect the day of the month. Don't remember how long it was before the body was found in the reservoir. Had been driving there for three months. Don't know where the American Hotel is.

John T. Williams: Drove a street car on 13th of last March. When I got on the turn table at the end of our line at Main and Reservoir streets this gentleman got on the platform of the car and helped the lady out. He says, "Mister, can you tell me where Reservoir street is?" I says, "Yes, sir," pointing my hand, "there is Reservoir street." He then says, "What building is that?" I says, "Morton's Garden." He had a satchel in his hand and had on a light overcoat and a sort of dark slouch hat. She had on a dark dress. Prisoner resembles the gentleman; he seems something like the one I spoke to that night. It was twenty minutes to ten when we got to the end of the line. They walked in the direction of the reservoir. He had a light mustache and curly hair around the ears. They went up the left side of the street. It was a cold night and all the windows were closed. Do not remember any couple getting in at the American Hotel. A colored man did; think this couple got on at 15th street.

Dr. Thomas E. Stratton: Am a physician. On March 13 about 9:45 p.m. I overtook a gentleman and lady on the right side of Cary street. By my watch it was quarter past nine o'clock. My watch was too slow that night owing to the second hand giving out during the day and interfering with the minute hand. It was about twenty-five minutes slow.

He turned abruptly around and asked me the names of the streets. I told him. He then asked me if I could tell him the time. As I walked off heard the remark, "I know that fellow but he doesn't know me." The prisoner looks something like the man, although the man I saw had a short mustache. He was muffled up around the chin; had on some kind of a comforter; had on a slouch hat, the brim of which was pulled down over his eyes. Did not get a full view of his face. I was watching his actions. At first he turned so abruptly I really expected an attack. The lady was not as tall as he; she had on no cloak or anything of that kind. She had no shawl. She had something under her left arm. Was a student at Richmond College before the war and have been going there since.

Herman Joel: Am a jeweler here but formerly had a store in Centreville. It was in Bland's place. I repaired watches and jewelry; I think I have seen the prisoner before, that I fixed a little ring attached to a watch key for him. Do not remember just what I did to it.

Mr. Meredith: Is this the key? A. I believe it is very much like that key, but I would like to take it apart, because if I did it there is a little pipe put in there, and I remember, if that is the key, that I soldered it in.

Mr. Meredith: If the counsel on the other side wish it they can have it taken apart.

Mr. W. W. Crump: We object to that.

Joel: I gave him the key back after I had finished with it.

Cross-examined: Don't remember how long I worked in Centreville; can't remember the date I got the key from him or when I returned it; or what I charged him. I had a book in which I put the names of my customers

in, but when I got it back from Mr. Bland the front leaves had been torn off, and now there is no name of the kind in the book. Cannot be positive that the prisoner ever brought me that key. He looks very much like the man.

Mr. Meredith: We propose to let him, if the other side does not object, take this key apart in the presence of the jury to see if he can identify his work.

Mr. Crump: We object, because we may have some expert testimony.

Mr. Meredith: We waive it, then. But any time you want the key opened in the presence of the jury we are willing to have that done.

Aaron Watkins (cld): Live on Cherry street. On night of March 13 about 11, when in my yard heard somebody holler and cry and then shout: "Oh, Lord," from the direction of the reservoir. Thought it was somebody fighting. I live about half a mile from there.

Dr. James Beale: Am physician to the city jail. Saw prisoner on 20th March and examined his hands. Found five marks of wounds on his right hand such as would be made by the removal of a varioloid scab; not like they were made by briars or splinter. I think they might have been made by finger nails.

Dr. J. G. Cabell: With Dr. Beale went to the jail to examine hands of prisoner. We examined his hands and think with him they may have been made by finger nails; don't think striking a fence or furniture could have made them.

Charles H. Epps: Am captain of police of Richmond. Arrested the prisoner. Arrived at Mrs. Tunstall's house about 7 on the night of 18th March. A gentleman came to the door. I said: "Is this Lawyer Cluverius?" He

said, "Yes." I says, "I am an officer from Richmond and I have a warrant for your arrest." He says, "For me?" I says, "Yes." He says, "Ridiculous." I says, "Yes and charged with murder." He says, "Come in." I says, "No, sir, just get your hat and coat and let us go quietly away from here." He says, "Come in and let us have some supper." We passed into the supper room. Noticed a piece of watch chain hanging loose upon his chain. He asked me for the warrant. He said, "I was there, but I didn't see her when I was in Richmond. I should like to know, sir, what evidence you have so that I may know what line of defence to prepare." With that, his aunt says, "I got a letter from Lillian dated the 14th of March." Don't think the prisoner ate much. After we got through he insisted on my staying all night. I told him no. He changed his clothes, put on a clean shirt. He took the things out of the pocket of the coat he had on and put them in the coat pocket that he wore over here to Richmond. While I was upstairs and the prisoner was in a leaning position, I motioned to Officer Robbins, shook my own

chain to him to notice the prisoner's chain, that he had a piece without any charm upon it and the officer gave me a nod to show me that he understood what I meant. His aunt says, "I think Lillian made a mistake in the date of her letter. Don't you think that Lillian committed suicide?"

Officer Robbins and Mr. Oliver, who were with me, put him in the buggy that we came in. We had not gone but a short distance when I says, "Cluverius, when you were in Richmond what friends were you with?" "Well," he says, "it is easy enough for me to prove where I was. Every place I went to I met somebody that knew me." I says, "Did you see Miss Madison when you were in Richmond?" He says, "I no more saw Miss Madison than Mr. Oliver did." Took him to a hotel in King & Queen County where we spent the night. We all had a drink in his room and when supper was announced he declined to go down, so I left Mr. Robbins with him. When I came back I noticed the piece of chain still hanging on his watch chain and I said to myself, "Little does he know that I have noticed that." That night prisoner was very restless. He seemed to be up on his hands and knees laying with his face to the bed twice. At Richmond took him to the Third police station. When I started to search him I noticed this piece of chain was gone. I says, "Where is that piece of chain, sir?" He says, "There was none on there." I says, "Don't you tell me that; yes there was." He said, "I gave it to my brother last night." I said, "Cluverius, I am sure I saw that piece of watch chain on your

watch chain at King & Queen Courthouse." He says, "No, you didn't, captain. Why? Do you want it?" I says, "Yes." He says, "I gave it to my brother." I says, "When?" He says, "Last night; I can get it for you." I says, "Are you sure you can?" He says, "Yes." I says, "So do."

That night after supper the sergeant said to me that Judge Crump had arrived and found him and the prisoner's brother in conversation. As I left the room the prisoner said, "Captain, about that chain, My brother has it and will give it to you." The brother handed it to me saying, "I found it lying on the table and I thought you might want it."

James Estis: Live about five miles from Centreville. Saw Cluverius on Saturday, 14th March, in Thomas Milby's store. Prisoner's father was in there sitting by the stove. Prisoner came in and remarked, "It is a cool day." His father told him he was looking badly. He said something about being up late that night. His father asked him how he got the scar on his hand; he replied he hurt it getting on the train; that his watch guard hung against something and he threw his hand up against the railing in catching himself. I didn't hear him say anything about coming from Richmond that morning.

Edward Pierce: Live below Centreville. Saw prisoner second Saturday in March in Milby's store. His father asked him if he got to Richmond in time to see speaker Pollard, and he replied, yes, he had not seen him since the evening before. His father asked him how he had hurt his hand. He said in getting on the train that morning, his

watch chain got hung and he threw his hand up and hit the railing and knocked the skin off his hand.

R. P. Dular: Am a commercial traveler. Know the prisoner. Went down to the jail on 22nd March to see him. He said he would account for every moment of his time when he was in Richmond in March; he would prove his innocence. Captain Bagby asked him if he had the scratches on his hand when he went down with him from Richmond on the morning of 14th March. He said, no, he did not have them then; that he got them at Centreville that day afterwards by striking his hand against a railing.

Logan S. Robbins: Accompanied Captain Eppes to Little Plymouth to arrest the prisoner. Prisoner was standing to the left of the table as I entered the supper room, and said, "Mr. Robbins, how is this? It is ridiculous. What are the circumstances? I would like to know what evidence you have so that I may prepare my defense." I told him that as he was a lawyer, and enough of a lawyer to know it was best that I should not say anything until I came on the witness stand. I remarked that I was actuated by no ill-will in this matter; that what I had done was simply as an officer of the law; that when I came upon the case I had no idea it would lead me to swear out a warrant against Thomas J. Cluverius.

My attention was called to his watch chain by Captain Eppes shaking his. I noticed a piece of chain hanging from the main chain.

Q. What is your recollection about the hat? As we all passed

out into the hall Captain Eppes remarked to him, "Are you going without a hat?" When I turned again I noticed prisoner had on a black slouch hat with the brim turned up. He took off his brother's hat and put it on his head, remarking, "My hat has a hole in it." On the road Captain Eppes asked him if he had seen Miss Madison in Richmond and he replied, "I no more saw her than did Mr. Oliver." And just there he told me that he had been at the Dime Museum that night and had returned about eleven.

John L. Oliver: Went with Officers Eppes and Robbins to arrest the prisoner at Mrs. Tunstall's. The prisoner told his aunt the officers had come to arrest him; asked us to take supper. After that asked if he could change his clothes; the officers said yes. When he came down he went into the parlor and from a little box got some money. He had no conversation with his brother that I heard. After he returned to the dining room he handed something to his aunt and whispered something to her. At King & Queen C. H. that night I was told by Captain Eppes that if I would look I would see that he had on a charm chain to his watch chain. I walked around in front of him as he was reading a newspaper and I thought I saw a piece of chain to his watch chain about an inch long.

John R. J. Vaughn: Live in King & Queen county. On 14th March last I was in conversation with Mr. Bland on the porch of Mr. Marston's—the post office—when the prisoner came into the porch and stuck up on the end

of the store a notice. Mr. Bland said to him, "You look pale, as if you had a chill," and made some jocular remark about his appearance, when prisoner said he was not sick but that he had not slept much.

Joel J. Bland: Confirmed last witness.

Hunter Hunt (cld): Am office man at the American Hotel. On March 13 about ten Mr. Dodson gave me a letter to take to room 21. Gave the young lady the letter. She gave me an answer which I took back to the office and gave to the colored boy. Saw the envelope only. (Witness shown torn envelope No. 9.) That is the same cream colored envelope that I helped Mr. Dodson to collect in pieces from the scrap basket. He spelled the name out, "T. J. Cluverius."

Saw the lady in room 21 go out of the hotel that night about 11; saw her body at the Almshouse; it was the same person. When she went out she had a red shawl on. A watch key was shown me there, and I told Mr. Witt I

thought I saw one like it on her bureau. I say now I might have been mistaken. I merely glanced at the bureau.

Joseph H. Dodson: Am clerk at the American Hotel. On the morning of March 13 I sent the negro office man a note for room 21; it was brought to the hotel by a negro boy, our man Hunt brought back an envelope which he first handed to the boy who carried it away and then came back and gave it to me. I laid it on the desk, waiting to be called for and the next evening I took up the city directory and looked for the name; it was addressed to which I thought was T. J. Clemens. Not finding any such name there, as the lady in room 21 had left, I tore it up and threw it in the wastebasket. On Monday at the request of Detective Wren I found the scraps in the basket. The envelope was a cream colored one. This is the envelope and note in scraps that I gave to Mr. Wren. Have not been able to find the colored boy since.

Mr. Aylett: We offer that note in evidence.

Mr. Meredith: The envelope reads as follows: "T. J. Cluverius, Richmond, Va.," and the little scrap of paper that had writing on it reads: "I will be there as soon as possible. So do wait for me."

R. D. Wortham: Saw the prisoner at the police court; my attention was called to the scratches on his right hand; he at times held his left hand to his face; when he took his right hand from his pocket he kept the palm of the hand up; he dodged his right hand about so much that I was struck by his action. He would

put it in his pocket, or place it on his knee with the palm up, then hang it under the chair.

Robert Caruthers: Am the assistant postmaster. Letter of deceased of March 14th, '85, being shown to him, he said he believed that letter was a drop-letter, that it was dropped in a street letter-box.

The attorneys for the State again offered to open the key, but upon objection by defence, on ground that they might wish to have

experts examine the same, they stated that they would not press the matter then, but it must be with the understanding that they would have the right to make the offer again at some time before case be given to the jury. *The Commonwealth* rested.

THE WITNESSES FOR THE DEFENSE.

Jane F. Tunstall: The prisoner is my nephew. The deceased was my niece. He has lived with me since 1876. While with me he went to school; two years to Dr. Bland; two years to Col. council's; two years to Richmond College. He finished in 1882 and has been practising law about three years. After he left college I gave him my husband's watch and key, the key he wore upon a

black guard. (Key handed to witness.) Never saw this key; he never wore any key but the one I gave him. In 1880-81 deceased stayed with me and I sent her to school. After she left me she wrote me often. This letter I received but do not think it is her handwriting, but I think the envelope is.

Mr. Crump: The letter reads as follows:

Richmond, Va., March 14th, 1885.

My Dear Aunt Jane:

I will drop you a few hurried lines this morning, as I want to go with a friend of mine on quite an unexpected little trip. As the weather is too bad up in the mountains either for me or the children to attend regularly, we thought proper to suspend for awhile, and so a friend of mine wants to go to Old Point for awhile and will pay all my expenses if I will go to be company for her. She is a nice and good lady, and it will be a nice little trip for me. Don't you think so? I have not time to say more, as it will be time to start soon. We came down on the train this morning. Love to all, and tell Tommie I will write to him real soon; but they must not count letters with me. You all need not write until you hear from me again. I will write as soon as I can. As I am in such a hurry I must stop. Love for all and lots for your dear self.

I remain, as always, yours,

LILLIE.

I got this Monday morning before I heard of her death. She was dead then but I did not know it. I got two letters from her in March besides that. I think there were two in March.

I think Miss Madison knew that the accused was engaged to Miss Nollie Bray. She was last at our house this coming summer now two years. Stayed a week. Her father and mother did not

know anything about it. She was not allowed to visit me; don't know why but her parents seemed to have a hatred for me. She told me they had forbidden her to write to me; she wasn't allowed to see her grandparents, though they lived within half a mile. This letter she wrote me some time the summer before last just after she had paid me a visit.

Mr. Evans read the letter:

My Dear Aunt Jane:

It is the 21st, and I have just gotten your letter. They have abused you and me for everything that is inhuman. O! what a terror my life is. O! how I am struggling—struggling with my poor weak self to-night to keep my resolve. I have wept until tears are no relief. And O! my sad suffering; but I have Jesus to look to. He suffered, too, even death, at the hands of merciless tormentors, and of course He knows my suffering. It is my prayer to-night that the sun of to-morrow may shine on me a corpse. O! if suicide were not a sin, how soon the lingering spark of my life would vanish; but I will wait God's own time. I know he is just, and will see that you and me, too, shall be righted.

You spoke of my being altered, but I reckon, dear aunt, you only wrote that to be seen, for surely you must know I am not changed, but the same Lillie that I was the 9th of August, when we parted at Clifton. Dear, dear aunt, I will never change. I do not know where to direct this letter, as I reckon you are in Richmond ere this. O, to think of my school, it almost kills me. I got a letter from dear Nolie to-night. Good night, dear aunt.

Ever your devoted,

LILLIE.

Mrs. Tunstall: The reference to her school means I think that her parents had refused to let her go back to school. I was very anxious to send her another year but her parents would not consent.

Cross-examined: While her parents were not exactly poor, they could not afford to give her the education I began for her.

Perhaps being with me made her want to rise in society and made her dissatisfied with her home. In answer to that letter just read about suicide, I wrote her not to think of such a thing; that she must try and do the best she could and they would do better. I always told her I was afraid she was in fault partly.

A statement (admitted by consent) of Miss Nolie Bray was read to the jury. It stated that she had been engaged to Cluverius up to the time of his arrest, for two years from last summer, with one intermission (of three or four months) about eighteen months ago. Miss Madison knew of it and though she wrote her twice, she did not make any mention of it up to June, 1884.

William B. Cluverius: Am prisoner's brother. Reside at my aunt's, Mrs. Tunstall's. We often wore each other's clothes. Was not particular when I went to our room if I should pick up his coat and put it on. He wore mine

frequently. When brother left for Richmond 12th March it was for business that he had in the bankrupt court. He wore a pair of gaiters but had with him artics. He never had a mustache. He wore a light spring overcoat and

on his black watch guard, a key that aunt gave him; he had no other key but that. The night he was arrested he took this piece of chain which was attached to his watch chain and threw it openly on the table and I saw him go to the grate and warm his hands in the presence of the officers.

Cross-examined: I know of my personal knowledge what brought brother to Richmond on the 12th and 13th March. He had this suit to attend to; have known it from half a dozen or more sources; had seen the notice for the sale.

Dr. J. E. Courtney: Went to school with prisoner and roomed with him at Richmond College. Have seen him wear a watch key with a reddish brown stone in it. This key (exhibited by Mrs. Tunstall) looks like it. Never saw him wear a key like that found at the reservoir.

R. H. Spencer: Have a farm two miles from Little Plymouth. Once saw prisoner with a watch key and was told by him it had been Mr. Tunstall's. Remember it had a stone in the head.

Monroe Morris: Reside near Little Plymouth; known prisoner for eight years. Saw him last summer with a watch key on a black guard; the same key was recently shown me by his brother. Key produced by Mrs. Tunstall seems to be the same one. Remember it had a set in the end of it.

E. C. Richardson: Had seen prisoner wear a watch key like the one given him by his aunt, but never one like that found in Reservoir Park.

Mark Davis: Keep the Davis House on Franklin street, Rich-

mond. Prisoner has stayed at my house on five occasions. He was there January 5 and 6, 1885, and the 12th and 13th March, 1885. My house is kept on the European plan. Prisoner came on 12th March between four and five o'clock and came in at night between eleven and twelve o'clock and retired. Did not see him during the next day. That night he came in about twelve. His overcoat was buttoned up; his deportment was pleasant and quiet. Did not notice any mud on his shoes. He said he would go to bed. He asked to be called at five o'clock in the morning. After he reached his room he sent a boy down for a bottle of whiskey, which was sent up. Told prisoner it was a beastly hour to get up but he said he had to leave in order to take the boat from West Point up the Mattaponi.

Rev. J. W. Ryland (Middlesex); *Dr. W. C. Barker*; *Wm. S. Courtney* (New Plymouth); *John B. Yarrington* (King & Queen Co.); *Dr. James F. Bland* (same); *Dr. A. C. Grubbs* (same); *Cleggett Jones*; *Prof. H. H. Harris*; *Dr. J. E. Courtney*; *Harry Dudley*; *J. C. Council*; *R. H. Spencer*; *Robert Todd*; *Thomas B. Bagby*, testified to the good reputation of the prisoner in his community.

G. W. Quicke: Was at college two years with prisoner. Met him in January last in Richmond at the "Moody" meeting one night after the meeting was over about half past nine and talked with him. Cannot fix the exact date, but it was early in January.

Thomas P. Bagby: Am an attorney at West Point. Know prisoner was here on March 13th last and saw him about half past

two that afternoon at Mozart Hall where the Dime Museum Company was playing "The Chimes of Normandy." He was seated when I came in. His reputation in our community has always been very good.

Cross-examined: Do not know if he remained in the hall; I noticed him only when I went in. At the police court he asked me, "Was it the evening or the night you saw me at Mozart Hall?" I replied, "The evening." He said nothing more.

J. J. Cordle: Am door-keeper at Mozart Hall here. Performance commenced in the day at half past two and closed about half past four. At night began at eight and closed at ten-thirty. The same piece was played on the night of 13th March which had been during the day performance, viz: "The Chimes of Normandy."

B. W. Cluverius: Am father of prisoner; reside a mile and a half below Little Plymouth. Knew my son was coming to Richmond on 12th March. My son Willie was to go for him on his return on the 14th, but he had other engagements and I went for him myself to Centreville, where I arrived about 11 or 12. Saw Mr. Pierce in Mr. Milby's store. Saw no bruises on his hand until he hurt it about two o'clock. Was placing things in my buggy and looked towards him and he was recovering from slipping down upon the fence on which he had been leaning. As he slipped he threw up his hands and one of them struck a knot-hole in the fence and made the bruises I saw upon it. There were four little places made by what appeared to be spears around the knot-hole.

Joseph Bland: Reside at Cen-

treville. Am clerk in the store of Bland Brothers. Herman Joel had a stand on the dry-goods side of the store. I generally had the stand in view. Don't remember to have seen the prisoner in the store at any time while Joel was there selling goods and repairing.

R. L. Savage: Was a clerk in Bland's store. Don't remember having seen prisoner give Mr. Joel any jewelry to repair. His stand was conspicuous and I knew Cluverius intimately.

Alex. F. Bagby: Met prisoner on the way back from Richmond where I had been on Saturday morning, 13th March. We talked on the train; noticed nothing unusual in his manner; he leaned back with his hands clasped about his head, but I noticed no scratches on them. That night we stayed together at my house. Asked him on the train where he stayed in Richmond the night before Friday. He replied at Cousin George Bagby's house. My wife, to whom I told it, alluded to it. He said, "No, I took tea there Thursday night." Was so confident he had told me what I told my wife that I said to her when he retired, "Look here, I believe that boy lied to me, or was poking fun at me, yet I may have misunderstood him."

George R. Bagby: Prisoner is a cousin of my wife. He was at my house Thursday night, 13th March. Stayed to supper and left about ten o'clock. Saw him take out his watch; saw no key to it on the chain; think I would have seen it if it had been there. Did not notice that he had on a watch chain. He had no mustache; never saw him with one. That

Thursday night he looked as if he had been recently shaved.

James T. Bland: Herman Joel did business in part of store at Centreville. Never saw prisoner in store while Joel was there but once and then Dr. J. E. Courtney was with him; did not see him give any jewelry to Joel to repair.

J. H. Atkins (Little Plymouth); *Dr. W. F. Bland* (same); *Dr. A. C. Grubb* (same); *Emmett Richardson*; *Wm. S. Courtney*

(New Plymouth); *Dr. James F. Bland* (King & Queen County); *Claget Jones* (same); *Beverly Anderson* (same); *Dr. J. E. Courtney*; *Harry Dudley*; *R. H. Spencer*; *P. N. Walker*; *Robert Todd*; *George H. Bagby*, testified that in March prisoner did not have a mustache.

Dr. W. H. Taylor and *George W. Minter* testified to contradictory statements made by witness Hunt, the negro boy, at the preliminary examination.

It was agreed by *Counsel* on both sides that from December 1, 1884, to March 5, 1885, deceased and Emmett Williams of Bath county, Virginia, wrote each other letters of a loving character but that there was no engagement of marriage or intention of such. That Emmett Williams asserts that he thought it was all in fun and believed that she meant it in the same way. That he had not seen her for a week or two before she left for Richmond in March; that he saw her not oftener than once a month and then always in the presence of some one else; that he never knew the deceased before she went to Bath in October, 1884.

IN REBUTTAL.

The following witnesses called by the Commonwealth testified that prisoner wore a mustache about the time in question: *William A. Spiller*, *L. B. Robinson*, *M. Puller*, *A. B. Hill*, *O. S. Stearnes*, *J. B. Simon*, *J. T. Reed*, *O. M. Winston*, *J. H. Haw* (who saw the prisoner at Court in the Country). I asked a friend who he was; took him for a "little dude." My impression was he wore a slight mustache.

Mr. Meredith asked again to have the watch key opened. The defence objected and the COURT declined to allow it to be opened.

THE INSTRUCTIONS TO THE JURY.

JUDGE ATKINS: Gentlemen: As the law you must follow in considering the evidence you have listened to, I give you the following instructions, substantially I think as they have been agreed upon by counsel for the Commonwealth and the prisoner.

1. Before the jury can convict the accused they must be satisfied from the evidence that he is guilty of the offence charged in the indictment beyond a reasonable doubt. It is

not sufficient that they shall believe his guilt probable only. No degree of probability merely will authorize a conviction, but the evidence must be of such character and tendency as to produce a moral certainty of the prisoner's guilt to the exclusion of reasonable doubt.

2. Each fact which is necessary in the chain of circumstances to establish the guilt of the accused must be distinctly proved by competent legal evidence, and if the jury have reasonable doubt as to any material fact necessary to be proved in order to support the hypothesis of the prisoner's guilt to the exclusion of every other reasonable hypothesis, they must not find him guilty.

3. If the jury are satisfied from the evidence that the accused is guilty of the offence charged in the indictment beyond reasonable doubt and no rational hypothesis or explanation can be framed or given (upon the whole evidence in the cause) consistent with the innocence of the accused and at the same time consistent with the facts proved, they ought to find him guilty.

4. It is not essential to proof of guilt by circumstantial evidence that the facts and circumstances established should produce on the minds of the jury absolute and demonstrative certainty of the commission of the offence charged to the exclusion of reasonable doubt.

5. The law presumes a prisoner to be always innocent of the charge alleged against him till he is proved to be guilty and the burden rests upon the Commonwealth to prove the guilt of the accused beyond all reasonable doubt; no mere preponderance of the evidence will suffice, as in the trial of a civil case, nor is it enough that by conjecture or speculation he may be supposed to be guilty, but the jury must be satisfied by the evidence that he is guilty beyond a reasonable doubt.

6. If upon the whole evidence in the case the jury entertain a reasonable doubt as to whether the deceased came to her death by violence committed by herself or by the hands of another they must find the prisoner not guilty.

Mr. W. W. Crump: I suggest that the third instruction is not clear. The word "hypothesis" must seem vague to a jurymen and in the fourth it is just as difficult to define "moral certainty" as it is to define "reasonable doubt." I ask the court to tell the jury that weighing all the evidence in the case, they shall require to convict such certainty as they would require if they themselves or any one who was dear to them were the subjects of the testimony they are now canvassing.

JUDGE ATKINS: I think the instructions as just given are ample.

THE SPEECHES TO THE JURY.

Mr. Aylett for the Commonwealth: Gentlemen: I approach the end of this cause with a feeling of awe. I feel as if I had been laced within the grooves of a destiny from which I cannot escape, and that whether I would or not, I had to take part in the destruction of a human being. Little did I think a few short weeks ago—nay, two months ago—that I would be here now; that faces which were strange to me then, by our long association, would have become as familiar to me as those of my own household, so burned upon my memory by all these events that have been transpiring around us, and all this testimony that will stay there as long as life lasts. Little did I think, gentlemen of the jury, that the cloud of guilt and of accusation which hung over the prisoner's head, no larger than a man's hand, could have steadily increased in volume and in darkness, until today it hangs over him ready to burst with destructive energy. Little did I think, gentlemen, that those fates and those destinies which control and which seem to sweep us on and in spite of ourselves, would have called on me to perform the part which I am now performing and on you which you are performing and are to perform. Little did I think, gentlemen, that when the Commonwealth's attorney felt called upon to retire from the case, and when yielding to the voice of the people of my own county where this young woman was born and lived, that I should come here; and that the public voice in my own county

should blend with the public voice of Richmond, in the prosecution of the crime, little did I think what I should be called upon to undergo.

Thank God, gentlemen, the hideous nightmare which for weeks and for months has rested upon my heart and brain is about to be discharged, and the duty and responsibility which has pressed upon me in no small degree, will soon, so far as I am concerned, be ended.

I cannot, gentlemen, at this point go further in the case without making certain acknowledgments which I might forget. My esteemed friend and associate, Mr. Meredith, who was a comparative stranger to me when I entered in this case, has fought so nobly and gallantly, and so truly and so faithfully, that the feeling of indifference with which we entered, so far as I am concerned, has melted into one of affection. And, gentlemen of the jury, I must say, after a professional life that long exceeds his, that whatever credit is due for the organization and for the execution of the plan in this case, that credit is due to him vastly more than to me. He came into this case at a period when it seemed to be professional heroism, and when for considerations known to you, the case had almost evaporated into air, seized it with a grasp of a master hand and soon order grew out of chaos, and that great rope has been twisted which now binds the prisoner to his fate. Not alone, gentlemen of the jury, do I feel indebted to you but to the noble body of men—the Richmond police—who have aided the Commonwealth in every effort. Not alone to these, gentlemen of the jury, but to the good men and women of Richmond, and also to the splendid organization headed by John Wren and the people everywhere who abhor crime and who with ten thousand eyes and ears and minds have held up the arms of the Commonwealth. I have felt, gentlemen of the jury, that I could not enter upon the discussion of this cause until I had placed these facts before you—until I had made proper recognition of those among whom I came a comparative stranger and by whom I have been received with arms of joyful welcome. I have felt that my first

duty was a proper acknowledgment of that. While I felt that general horror which every man felt when this crime was first announced, yet I have felt no more in that regard than every good man and every good woman felt throughout the land. But while feeling that we have been desirous that this case should be conducted in a manner that would reveal the true murderer, and I hope in the discharge of the duty which is now resting upon me, that I will disclose him to you in a becoming manner. I trust sincerely that no unkind word or thought may fall from me that may not be called forth by the duties of my argument. I trust that I may be permitted both by my nature and sense of justice and of right, to throw aside as far as I can the partisan, and deal with these facts and this law as if I were a friend seeking to find with you the truth; that I may by my humble aid afford you help and may conduct you step by step up those rugged steps that lead to that temple at whose door Truth stands and within whose vestibule Justice sits enthroned, weighing in her balance the fate of this prisoner.

The Court has instructed you as to a reasonable doubt, what it means, and as to the presumption of innocence. The latter stands over and hovers about the accused until the evidence breaks down the presumption. A reasonable doubt is not fanciful or whimsical doubt. It is a doubt you can give a good reason for. It is such a doubt as would stagger you in your own affairs; a doubt for which a good reason can be given. Nor do we claim that a mere preponderance of testimony will justify conviction. You must look for the evidence that will remove "all reasonable doubt." If you can't tell whether it was a case of murder or suicide, then you are to give him the benefit of the doubt. But if the evidence drives the doubt from your minds and places the crime on him, then you must find him guilty. A moral certainty is not like a mathematical certainty; it is not like two and two make four, or the demonstration of a proposition in Euclid, but is a certainty satisfactory to your minds and conscience. Doubts may still be there, because all human affairs are matters of doubt. People trust every day to circumstantial evidence. The rain

that fell during the night was not seen by those who slept during its fall, and waked in the morning to find the streets and gutters clean; but still we knew that the rain had fallen. In fact we act in life more on circumstantial than we do on direct testimony. In every day matters and in our intercourse with the world we are guided by it to a large extent.

You must consider this case under two heads. First, there has been a murder. Second, who was the murderer? You have heard the story of the finding of the body in the reservoir; of the tracks on the bank; of the apparent struggle there; of the watch key found near the fence; the visit of the prisoner and his victim to this city; the walk to Belle Isle. All these negative the theory of suicide which never had any vitality and was started by her remark to the train conductor that she wished it would run off the track. Was it possible that a woman as timid as she was would ever have gone to a locality as lonely and jumped into a place like the reservoir, tearing the sleeve of her jersey in doing so? I am arguing to bearded men, men of brains. Was it possible that she would have disposed of her satchel, hat and cloak in the manner she did if suicide had been contemplated? The instincts of humanity makes a woman love life when in the condition of Miss Madison. She was a murdered woman and her death was a violent one and without parallel in the whole country. Decoyed from Bath and used for vile purposes and then murdered. Who did it? What did he do? Where is the finger ring she wore? There was the hand of Providence in this matter and it pointed to the prisoner. He evidently thought that the body would be thrown in the reservoir at a point just above the waste pipe and he hoped doubtless that she would never rise to the surface, but be drawn into the pipes. He couldn't afford to take her through the streets with the lamps lighted. A murderer hasn't time for reflection. God only sees the man who commits so dark a deed, and the murderer forgets that there is a God.

The prisoner possessed himself of her person and her good name and she withheld nothing from him. He might have known where Dunstan lived through her and have put the shawl on his fence to divert attention from himself and to

Dunstan. Did she put the clothes-bag in the river? Hardly. He took the bag to see what was in it and it was possible that he left it in some convenient place the day before, and afterwards (the next morning) took it and threw it in the river. Am sure as you are born he went where he left this evidence the morning he left the city and deposited the evidence of his crime in James river.

When a murder is committed who is to be benefited? Think of this. When a man's throat is cut on the highway, what is it for if not gold or silver? When a woman, soon to be a mother, is murdered, who is to be benefited if not the man who is the father of the child? And who was the father of that child? I say the prisoner at the bar was that father, and that he committed a double murder—that of his offspring and that of the woman he had deceived. Again the most damnable thing in this entire matter is the fact that it has never been shown that the prisoner ever did one kind thing for the poor, dead woman. He was engaged to Miss Bray and he had to put poor Lillian out of the way. Now for the motive. Can you imagine a case that motive does not more thickly crowd? Ah, gentlemen, had his crime ever been known would not his old aunt have hissed him from her house? Would he not have been sent out from his place as assistant of the Sunday School at Olivet church, and have been driven from his place as a lawyer at the bar? Disaster, financial and professional ruin, dark and hideous would have burst upon him wherever he turned.

He came to Richmond and put up at the Davis House. She registered at The Exchange as Miss Merton—the name he gave at College. Claggett Jones recognized her at the Exchange as Miss Merton. What was she doing there? Mr. Archer recognized him; Henrietta Wimbush recognized him. They denied the mustache, but we think we have knocked the black out of the mustache. It was not what men don't see but what they do see. Men have sworn that they have not seen a mustache, but there were three or four others who had sworn that they had seen him with a mustache. Two of his college mates had sworn to his wearing a mustache. Why are all of his letters gone except the one advising her to marry, and that abomi-

nable piece of poetry that makes the blood boil whenever it is thought of. If she was in trouble with her father and mother ought he have taken advantage of it? What man of honor would have polluted and defiled her instead of seeking to rescue her? She went to Bath and yet he followed her and we find him on the 5th of January with her. He told Mr. Cuthbert that he hadn't seen her since September, 1884. Was not this a falsehood and didn't he have a reason for it? It was for a guilty purpose and for his protection. When he came into the hotel he commenced to play a part in keeping with his whole crime. It made no difference about the old man. We have the young one. He was skilled and trained in his duplicity and kept up the part. He inspired the Curtis letter and was trying to offplay a Harry Curtis. What did Tyler know about this letter which to each was well known? Tyler saw them together in the parlor and saw her light burning at 12 o'clock, and it was the last night she ever saw on earth. Dillard recognized him as the man who sent the note. Tyler saw them together; Tucker saw them get on the street car. A negro could recognize quicker than most people; their minds were unemployed and better calculated to recall faces. A key of a strange and old make is found there by John Williams, a small boy who stood his cross-examination better than any witness I most ever saw. He carried it to John Wren and it has been identified. Joel said he thought the prisoner was the man whom he had seen with the key; that the key was the same that he mended for Cluverius. He wanted the key opened and the defence objected. Walker had identified the key to the best of his ability because the prisoner had offered to swap. He had identified the key himself by the attempted destruction of its identity. Captain Eppes charged Mr. Robbins to look for the watch chain, but there was nothing to it. Oliver saw it, too. When they reached Richmond the pendant was gone.

How lame and impotent was his brother's tale that he brought it along thinking it would be important. He had furnished the Commonwealth with evidence to hang his brother. The falsehood told by the prisoner furnishes the

Commonwealth with another of the many mis-statements with which the case bristles. His own guilty action identifies the key. The Tunstall key neither fitted nor wound the watch of the prisoner's, and the one found did. Did he ask for what he was arrested? The coolness of the family was something past understanding. None of them asked why he was arrested. Their behavior was wonderful. It was a time for screams and palpitation of the heart and yet no one was startled. This was a moral young man who drank whenever an opportunity offered and smoked when he could and who had the nerve to pray (and he ought to have prayed). He entered upon the trial laughing, smiling. When his cousin's clothes were laid out and Mrs. Dickerson was on the stand, his eyes were dry when hardly anyone else's in the courtroom were.

He told Mr. Robins that he was well known here and could explain where he was, but never did it. He said he could prove where he was and could get detectives to clear him, and intimated that someone like him had impersonated him, yet he has never accounted for his whereabouts between eight and twelve o'clock the 13th of March. Oh, the danger that hovers over him for his failure to account for those fatal hours between eight and twelve o'clock p. m. Oh, the terrible peril he is in for his failure to keep his promise to account for himself at that time! Of all the men in the world he is the one man who can do it. And yet with all the anxiety of friends and with all the fears that must hang over him and all the fidelity and ability of counsel, no one word is vouchsafed to you where he was between those fatal hours. There is but one supposition and hypothesis, gentlemen, consistent with all the facts, dangerous facts in this cause, that he was out at that reservoir there in his guilty work of killing that woman. Every other fact in the cause makes loud proclamation of it and there is no escape from the inexorable destiny that chains him there at that place and within that time. What other effort is it that he makes to account for himself? Why, Bagby is put upon the stand. Bagby says he saw him at the Dime Museum at the afternoon performance and that it commenced about two o'clock and wound up at four or a little past four, and that

although he sat within five seats of him he did not observe him afterwards and he thinks if he had remained there he would have observed him. That is all that accounts for him there. But that does not bring him to safe ground, gentlemen of the jury.

Of all the facts that damage him in this cause, the failure to prove where he was then is the darkest, the deadliest fact. How does he meet this terrible accusation? He brings men here to prove his good character. Gentlemen, how can that save him in the face of these facts before you?

In doubtful cases very often parties are reinforced by proof of good character. But is this a doubtful case? Is this a case where good character can turn the scales? Of what value is good character when an offence is as clearly made out as this by the circumstances? Why, gentlemen, could not Judas Iscariot, before his fall, have proven by the eleven disciples that he had a first-class character? Do you suppose that before his sin had found him out, all save the Son of God would have proved for Judas that he was a man of first-class character and that the disciples would have put their sign-manual to it? Do you not suppose that Benedict Arnold before he betrayed the American cause could have obtained proof of his good character from the father of his country down? Did not John W. Webster, a professor in the Harvard University, standing high and lofty before the world as a man of science and letters, and of irreproachable character, murder his creditor in his office and burn him up in his furnace? See *Am. State Trials* IV, p. 93. Did ever a man prove a better character than his? Did not Eugene Aram, a man whose name was on the ladder of fame, and of letters in Europe, honored by the world, prove a good character? But the tempter came and he fell and twenty years after the death of his victim when his victim's bones, rotten and fleshless, were dug from the ground, Eugene Aram died in the face of the best character that ever was proved by man. Has it been so long ago that the case of Colt has passed from the memory of some of the older gentlemen among you? John C. Colt, the son of Samuel Colt, the brother of the pistol manufacturer, knocked

down with a hatchet and dismembered and salted up the remains of his victim and shipped him to a southern port. His sin found him out and he anticipated his doom by suicide in The Tombs. See Am. St. Trials I, p. 455. Did he not prove a good character? It will not do, gentlemen of the jury, it will not do. And when I looked at the prisoner during this trial and watched his demeanor, his calmness, his smiles, when he ought not to have smiled, his defiant bearing, I was reminded of another piece of acting, in Scripture, which reveals the difference between the innocent and the guilty. Do you recollect when the Lord said to one of His disciples, "One of you shall betray me," that they began to be exceedingly sorrowful and one after another, the innocent, trembling and whispering, said, "Lord, is it I? Is it I? Is it I?"—the pure and spotless and innocent ones, trembling and shaking and cowed. But at last the guilty one with brazen front and defiant air, said, "Lord is it I?" and He said, "Thou hast said it."

We stand here as the representatives of public justice, as the representatives of the people of the Commonwealth. In some States the style of these prosecutions is "The People against the Prisoner," in others, "The State against the Prisoner." Here we have it, "The Commonwealth against the Prisoner." We stand here, gentlemen of the jury, as the representatives of the law which shelters our homes and protects our lives, which hovers over our cradles and follows us to our graves and protects our remains after they are interred in mother earth. We stand here as the representatives of our mothers, of our wives, of our daughters and our sisters. We ask at your hands a verdict that shall make woman safe in this land from the seducers and the murderers. We say that if this victim had been a strong and guarded woman we could feel as if, perhaps, some degree of mercy might be meted out to him. But she was a lone and loving and trusting woman—the mother of his child. Gentlemen, in all the annals of crime has such a crime ever been committed? Will they talk to you about mercy? Mercy! Has he not lived too long? Turn him loose for his progeny to vex and plague mankind? Standing

here for the men and women of the Commonwealth of Virginia, for our beloved women, I demand his life as forfeited to the law—his life for her life. There is not a home in Virginia that did not feel insecure after that body came up on the surface. The whole state seemed pregnant with danger; and if he escapes who is safe? Gentlemen, it is your duty to destroy him. Stand up to your duty like men. I have seen too many good and brave men shed their blood in these trenches around Richmond—the best and noblest of their race—to falter in my duty in asking for his life at your hands. Guard the house-holds—and guard the daughters of Virginians. This case has become historic. I saw a few days ago (in the Dispatch) a picture that has perpetuated your faces. Your memories and your deeds will be perpetuated by a becoming record made up by him (the stenographer) whose facile pen records every word as it drops from my lips. The great reading, listening and watching world has seen and heard the facts on which you are called upon to find your verdict, and they are as intelligent as you and they will try you and they will try me and they will try all the actors in the scene. Last evening, sick, tired and wearied out by the labors of the courtroom and the heat of the atmosphere I went out to Hollywood—that lovely spot, that silent city of the voiceless dead. There are many there that are dear to me, at whose tombs I like to stand and think and feel moved, perhaps, by that strange emotion that often makes us seek companionship with the dead and those long gone from us. As I stood there and as I wandered on by that stone monument placed there by the women of Virginia before they had stopped even the shot-holes in their houses, to commemorate the valor and the virtues of the men of Virginia, I saw, clustered around and about these humble graves that mark the soldier's last repose many of whom were friends and comrades; they were not those who fell where their manly bosoms met the storm of war, not those pierced by bullets and torn by shell; but they were those whose young lives ebbed out in the hospitals of Richmond, soothed by the gentle ministering hands of the women of Richmond, lingering long enough perhaps to carry on their cheeks to the other world a

kiss of a mother, wife or sister, bedewed with their tears. As I stood there, gentlemen, thinking of what I was to say here today, and looking towards the reservoir—that scene of crime—and thought of those screams that came by there and went down the valley and were heard by that colored man, the thought came to me that if there was any thing above all others that twelve men owed to the female sex of Virginia and to the people of Virginia it was to vindicate the law in this case and protect the women of Virginia. Gentlemen, I am done. I thank you for the kind attention that you have vouchsafed me. I thank His Honor for his courtesy and his fairness and his ability in his rulings. I thank my friends upon the other side that have borne, perhaps, so well with my imperfections; and I thank the police, the detectives and the gallant citizens of Richmond for the aid they have given us in this great trial. Falter not, gentlemen of the jury, falter not in your duty—show the mercy to him that he showed to his poor victim. The evidence which is here is complete and satisfactory unless one more witness could come. If Lillian Madison could burst the bonds of death that hold her and stagger into this room with her winding sheet and with her wounded lips and brow and fall down and point to him as the man, it could hardly be plainer. Farewell poor Lillian, thou art sleeping in the lone and silent grave, but still you are remembered by the tender mothers of Richmond and of the world.

MR. EVANS AND MR. POLLARD FOR THE DEFENSE.

Mr. Evans: Gentlemen: Conscious of the solemn obligation that rests upon me at this hour, I take my place as the first among the counsel for the defense to present an argument in behalf of the unfortunate prisoner at the bar. Being the first to be retained as his counsel on the night of his arrest, the position has been assigned to me among my associates to be the first to open my mouth in an attempt to make an argument in the defense.

It is a subject for congratulation for the defense to know

that the prisoner at the bar is not to be convicted upon the argument of counsel for the prosecution, clothed in the beautiful figures of rhetoric, roving among the vales of fancy, going back to the days of Judas Iseariot, of Eugene Aram, of John C. Colt, of Benedict Arnold. But you, gentlemen, are under the obligation of an oath that you have taken to hear the evidence under the light of the law that is to govern in this prosecution and to find a verdict that is founded upon evidence.

I recur with feelings of great satisfaction and pleasure to the patient attention, the careful thought that has impressed itself upon your countenances; the diligent, the laborious care with which you have considered the evidence that has been adduced in this prosecution both for the Commonwealth and for the defense; and when I am reminded by my friend of the powerful combination that has set in against the prisoner, consisting not only of the full police force of the city of Richmond, of the dual representation of Commonwealth's attorneys conducting this prosecution, of the efficient—but that is all I can say of it—detective service of Jack Wren supported by the sympathies of the men and women of Richmond; further than that, urged on by the universal sympathy of mankind, as my friend expresses it, it is with pleasure that I look as to the anchor of hope to a Virginia jury who will remember and who will carry along with them the consciousness of that obligation which they assumed when upon their *voir dire* they declared that they were above the influences of the surrounding community and that they were prepared to hear impartially and to decide impartially as between the Commonwealth and the prisoner. Yes, gentlemen, when I remember the active agency of this miserable detective force, when I remember the combination that is against the prisoner, it gives me proud satisfaction, as I know that it does you, to remind you of the fact that there is an oath which you have taken which like an adamant chain binds the integrity of every one of you to the throne of justice.

Gentlemen, I say that it is a subject for congratulation that the prisoner is not to be convicted upon the eloquent argu-

ment of counsel for the prosecution. The Court has given to you the law containing the instructions for your guidance. And I say in response to that expression of sympathy which was extended so sincerely and with so much of friendship by my friend, Col. Aylett, to my associate Mr. Pollard and to myself that from my heart I sympathize with Col. Aylett in the position he occupies before this court as the hired prosecutor of this young man at this bar. I had a thousand times rather appear before a Virginia jury defending the oppressed around whom the rope has been coiled, who is to be swept under by the powerful wave that is rolling against him; and that is about to burst upon his head—I had rather be here defending this oppressed man in the face of such a combination, than to be the hired aid of the Commonwealth to prosecute him and to cry aloud for his blood.

(Mr. Evans then at considerable length reviewed the evidence in the case.)

Finally, gentlemen of the jury, remember when you retire to consider all the evidence that you have listened to, that the prisoner at the bar as the judge has told you, is protected all through by the presumption of innocence. He is presumed innocent until the evidence satisfies you of his guilt beyond a reasonable doubt. Never forget that, gentlemen, and do not, I pray you, permit the fact that he has been charged and put on trial for this crime influence you in the least as it has unfortunately done in many criminal trials. I remind you in closing what has been said by jurists and great legal advocates as to this important point. A leading American writer on the law and whose book on *Presumptive Evidence* is an authority in every court (Lawson, *Presumpt. Ev.* pp. 433) after laying down the legal maxim that every man is presumed innocent until his guilt is clearly proved, quotes with strong approbation the language of one of the greatest lawyers this country has produced: Rufus Choate, that it is in the nature of evidence for defendant, that it hovers over the prisoner as a guardian angel throughout the trial, that it goes with every part and parcel of the evidence, that it is equal to one witness. And he adopts the opinion of another writer,

who regrets that this principle is not observed as it should be, but that the presumption is too often reversed; and by court and jury, by prosecution, police, and by the public, the accused is presumed guilty.

I shall conclude my remarks by reading to you the closing words of one of the most distinguished advocates that ever wore the gown before a British forum in the argument of a case of circumstantial evidence; these are those words:

“And now, gentlemen, having traveled through this case of mystery and darkness, my anxious and painful task is ended. But, gentlemen, yours is about to commence and I can only say, may Almighty God guide you to a just conclusion. The issues of life and death are in your hands. To you it gives to consign that man once more to the enjoyment of existence and the dignity of freedom or to send him to an ignominious death and to brand upon his grave the awful epithet of murderer. Gentlemen, mine has been a painful and an awful task.”

But still more is the responsibility attached to the decision upon the general facts or circumstances of the case. To violate the living temple which the Lord hath made—to quench the fire within a man’s breast—is an awful and a terrible responsibility and the decision of “Guilty” once pronounced, let me remind you, is irrevocable. Speak not that word lightly—speak it not on suspicion, however strong, upon moral conviction, however apparently well-grounded; upon inference, upon doubt, or upon anything but the broad, clear, irresistible noonday conviction of what is alleged.

I speak to you thus in no hostile feeling; I speak to you as a brother and a fellow Christian. I thus remind you of your awful responsibility. I tell you that if you condemn this man lightly and upon mere suspicion consign him to an ignominious death, the recollection of the deed will never die within you. If you should pronounce your verdict without a deep and irresistible conviction of his guilt, your crime will be present to you during the rest of your lives—it will pursue you with remorse like a shadow in your crowded walks; it will render your death-bed one of horror and taking the form of that man’s spirit it will condemn and sink you before the

judgment seat of your God. So beware, I say; beware of what you do.

Mr. Pollard: May it please the Court and you gentlemen of the jury, I crave your patient indulgence while I present the case of my client. I shall do so as briefly as I can, but the evidence is so voluminous, the facts and circumstances are so numerous that it is impossible that my address should be brief. I therefore ask that you will give me a patient hearing, anxious as I know you to be to have all the light that can be shed upon this great mystery that you have been considering now for these twenty days. On one occasion when a mere tyro at the bar addressed the greatest judge that ever presided in an American court and perhaps in any court, Chief Justice Marshall, the young man modestly said that he did not know that he could say anything that could shed any light upon the question. But His Honor from the Bench said to him, "Go on, my young friend, I have so long been in a position where I know and feel the frailties of human judgment that before I pass upon any matter I want all the light that will elucidate the truth involved in the matter under consideration." So I feel, gentlemen, that you occupying that position, sitting to pass judgment in a case that will go down in history as one of the celebrated cases that have arisen—a case of a century—for I apprehend that a whole century will roll around before another case will occur like the one that you have been considering—will patiently hear me while I present the case as best I can.

First, gentlemen, in regard to the character of the proof that is necessary to establish guilt in criminal cases in general and particularly the quantum of proof that is necessary to establish a belief in the guilt of the individual in this case. These are the questions to which I shall first address myself. The law of the case as presented by His Honor in the instructions given to you on yesterday when boiled down and concentrated into one idea is this: That you must believe in the guilt of the prisoner beyond a reasonable doubt; that he comes before you clothed in the robe of innocence which the law has thrown around him and that it can never be stripped from

him until you shall believe beyond a reasonable doubt that he is guilty of the offence with which he stands charged. This quantum of proof, this measure of evidence necessary to convict in criminal cases, is not new to the law. It had its origin in the direct command of the Creator himself. It comes to you in the law of Moses and of the prophets. God said to Moses—I quote from the 17th chapter of Deuteronomy and the 6th verse, “At the mouth of two witnesses or three witnesses shall he who is worthy of death be put to death; but at the mouth of one witness he shall not be put to death.”

There was under the Mosaic law a quantum of proof necessary to be attained in the trial of criminals which did not prevail in civil matters and in the trial of matters that simply related to transactions between man and man. One witness might come up before the Jewish Sanhedrim and testify that he saw with his own eyes the crime committed. The Sanhedrim, the grand court that sat in that trial—the congregation of the people—might have a moral conviction and belief that that witness spoke the truth and that the accused was guilty; yet there was a lack of proof. It must be spoken by two witnesses, and until spoken by two witnesses the accused could not be convicted of the offence with which he was charged.

Thus we have Divine authority for the wise rule of law that says that the jury before they can convict must be satisfied beyond a reasonable doubt, and we put the reasonable doubt in the place of the two witnesses under our law and that is the only difference. But the quantum, the measure, is the same. Two witnesses were necessary under the Mosaic law to convict, to abolish a reasonable doubt. So under our law so long as there is a reasonable doubt no conviction can be had. You may believe the facts and circumstances to point to guilt, suspicions may be aroused, but until you reach that point where the quantum of proof is full and complete a verdict of guilty can never be legally rendered.

Now, gentlemen of the jury, this is so in every case. It is particularly so in cases of circumstantial evidence. His Honor has said to you that every fact and every circumstance in the chain of circumstances necessary to connect the accused with

the crime must be separately and independently proved by that quantum of proof. You find the elementary books teeming with the assertion that this is particularly true in cases of circumstantial evidence and that the jury must be cautious to weigh carefully every fact, every circumstance necessary to connect the accused with the crime. Presumptions must not be confounded with circumstances. I say, gentlemen of the jury, I would have that impressed upon your minds as one of the cardinal principles which is to lead you to a just determination in this case—a presumption must not be confounded with a circumstance.

A very celebrated case is reported in the books of a man convicted of murder by poison. One of the circumstances necessary to establish that poisoning was in the drink that was administered to the deceased; and the only circumstance to prove it was that the poison smelt like some decoction that was poison in itself—poppy-water. Now there was a circumstance, viz.: The fact that it had a peculiar smell. What was the presumption? The presumption was by the jury that because a dose had been administered which smelt like poppy-water or deadly poison, therefore the man who administered that potion, poisoned the deceased. Upon that bare circumstance the accused was convicted and executed, and went to an untimely grave.

Mr. Pollard, after a review of the evidence, concluded:

Yet the Commonwealth, backed up by all the power it can command in every direction, demands in this court at this late day, in this enlightened age, that that shall be done which was done in days that are past but which is no longer to be done in the light of the civilization of this day.

My friend says the people of Virginia rise up as one man to demand the conviction of the prisoner at the bar. We are not here, His Honor sits not there, you are not sworn to carry out the demands of the people of Virginia. But you are here to try this case upon the law and the evidence. Demands of that sort are unreasonable, unjust. Such demands may result in the sacrifice of the innocent. Since the day that the mad-dened mob cried, "Crucify Him! Crucify Him!" no reliance

is to be placed upon the demands of the impassioned mob. Prejudice runs away with them. They inconsiderately conceive ideas not justified by the facts. When the Apostle Paul saved from ship-wreck sat over the fire built upon the island and the viper came out of the wood and fastened itself upon his hand, the islanders said, "He is a murderer who has escaped the dangers of the sea, whom the vengeance of God permitteth not to live." He shook the viper from him and felt no harm. And that same prejudiced crowd at once said, "He is a God and not a murderer." That, gentlemen, is a fair sample of public opinion.

Now, gentlemen of the jury, what caution should characterize your deliberations in cases of circumstantial evidence? The books teem with cases where men have been improperly convicted on circumstantial evidence. My friend, Col. Aylett, says circumstances never lie. I say so too, but I say that when you see a certain track, that is not conclusive; when a potion, for instance, smells like poison it does not necessarily follow that it is poison. It is not a necessary presumption to arise from that circumstance that it is poison. A potion is necessary. Circumstances do not lie but witnesses who testify to circumstances lie and we have abundant proof of it and hence, gentlemen of the jury, is the importance of weighing carefully circumstantial evidence. Where the evidence is direct, where a witness saw a deed performed and acted there, he is an eye witness and no presumption is necessary to be deduced from what he has seen with his eye. But where the conclusion rests upon a circumstance, then the deduction has to be wisely and judiciously made from that circumstance. Hence it stands removed three degrees from the truth and you are only one-third as likely to attain truth in a case of circumstantial evidence as you are in other cases. Witnesses testify untruthfully that a certain circumstance exists. If that circumstance does not exist in fact, it is just as much inconclusive as if a man had sworn to the fact that he had seen another commit murder when he had not seen him commit it. Consequently caution everywhere in the books is asked to be exer-

cised by juries in the determination of guilt where it is dependent upon circumstances.

But, gentlemen of the jury, I have detained you already too long. Imperfectly I know I have discharged the duty that rests upon me, but it now draws to a close and as far I am concerned I leave the destinies of this young man in your keeping, believing that those destinies are committed to the keeping of prudent, wise and judicious Virginia gentlemen, who have but one desire and that is to attain truth and to vindicate right and justice; let your verdict be that and I shall be satisfied.

MR. CRUMP FOR THE PRISONER.

Mr. W. W. Crump: It is difficult, gentlemen, for me to tell you the emotions that fill my breast as I stand before a jury charged with the issues of life and death. I cannot make you sensible, for my language is inadequate to that end, of the deep reverence I feel for those charged by the law with the solemn trust which you are now called upon to execute. There is something about a jury, gentlemen, which always awakens in every case my profoundest respect. You occupy the highest position known to the execution of human laws and you are the final arbiter upon the life, the liberty and the property of every citizen in the Commonwealth. It has been truly said that the organization of government at last finds its expression and its vindication in the twelve disinterested and impartial men who occupy the jury box. Your sense of personality is almost entirely lost to me; you seem to have been transformed from the ordinary citizens who walk these streets into priests, ministering at the altars in the temples of justice. You have stripped from yourselves those ordinary robes of passion and caprice and self-will that govern us in our walks in life, and have gone through a species of purgation, in taking the oath which qualifies you to sit there, which has made you the exemplars of the highest morality and disinterestedness known among men. And hence it is I stand before a jury-seat surrounded by the guardian barriers which the law has placed

about you, a jury who, before they take their places, invoke the solemn presence of the Great Eternal to witness that they will decide the case upon the law and upon the evidence; that they will divest themselves, as far as human nature is capable of divesting itself, of the things of earth, the weight of clay which encompasses us all, and stand in their moral natures, free from bias or prejudice, alone and give judgment upon the evidence they have heard, without fear, favor or affection. And hence, when I entertain that feeling toward this greatest tribunal of earth, sworn to determine upon what they hear from the witness stand, and upon that alone, you may judge of the amazement with which I have heard that tribunal appealed to, to take the life of this accused, because of thousands, outside of you and of your duties and of your functions, who clamor for it and who are watching you with jealous eyes in the expectation that their frantic purposes shall be accomplished; purposes dependent upon no such facts and testimony as you have heard, but the result of those common feelings and passions which, while they are honorable to our nature, are easily kindled into violence and excess. And, therefore, when the story is told that this accused has debauched the morals, deflowered the person and taken the life of his victim, it is but natural that a shudder should run through society and all the generous feelings of our nature rise in revolt and horror at such an alleged crime. And, therefore, something may be pardoned to those who, with no further knowledge than this general ascription of crime, have had their minds filled with the idea of the guilt of this accused. But for you, who have not shared in that idea, who come dispossessed of it, to listen to the evidence, there is a different, a totally distinct task and labor. You pass upon the testimony, and upon that alone. If it conducts you to this man's guilt, follow with steady step the line of your duty. If it takes you to his innocence, follow it with the same steady and defiant step, careless of what may be thought, except by that great presence whose aid in your labors you have invoked.

Gentlemen of the jury, it is easy enough to those who do not think, to those who will not think, to those who do not

know and to those who do not want to know, to arrive at a conclusion. But for those who mean to arrive at a just conclusion, who mean to thread their pathway into the light of clear and perfectly, or well established, facts, the task is difficult and tedious and wearisome. And, if you could, you would put it aside, as we all would. But amidst this maze of testimony you have to find your pathway, to see the light of day shed upon your path from the reflected sunshine which strikes the facts in this case and illumines your way. Your path will be devious and difficult. It is vain for you to tire in the examination of the evidence; you must sift it. You must pronounce upon all this evidence by the aid of all your intellectual powers—by deduction, by analysis, by your experience of mankind and of his motives and conduct. By every method that you would try a circumstance, must you try every circumstance in this case upon which it is relied to convict this accused. And when it is done and your task is over, while it will have been tedious and wearisome, you will have the consciousness of knowing that you have performed your duty in the one mode in which it is practicable, and with a safe conscience you may lay your hands upon your hearts and appeal to the Great Divine to witness that you have performed your task. And nothing short of that will answer.

Gentlemen, I shall waste no time in getting down to what I consider the real questions in this case. The ground has been traversed with ability and power by my associates. I can add but little to what they have already said, but I will endeavor to give to you the result of my thoughts upon the testimony which you have heard.

There are two great cardinal facts in this case, upon which the Commonwealth relies for conviction: First, that the accused took the deceased from the American Hotel, carried her to the reservoir and there slew her; and second, to support the theory of murder at the reservoir, a piece of property, charged to have been his, is said to have been found upon the spot.

Now those are the two great cardinal facts in this case. Everything else in it is dwarfed into insignificance, if these two be not established. To establish them, remember, there

is not one word of positive proof. Remember, in this case, the ordinary incidents which attend charges of this sort are utterly wanting. There is no human being who pretends to have seen these two parties near where the death occurred—none nearer than a quarter of a mile, or more, to where the death occurred. Dr. Stratton, the last who supposes that he saw parties that he thinks were these, or may have been these, saw them more than a quarter of a mile from the spot where the death occurred. No human being has ever heard this accused utter one threat of violence against the deceased. She was his cousin; she was his friend. All that you know of the personal relations between them discloses a state of kindness such as might exist between young kinsfolk as they were. Not one whisper ever fell from his lips to indicate a purpose to take the life or injure a hair of the head of the deceased—not one single preparation to take her life; not one single motive to take her life that is founded upon a substantial or a respectable reason. What gentleman upon that jury can answer to his own satisfaction what motive animated this accused to take that girl's life? What has been suggested? Why, that his aunt would have discarded him from her favor, society would have turned its back upon him, if it had been discovered that he was the father of the child. That is assigned as a motive. You are asked to assume that it was the motive. Is that a common motive? You are put there to judge, by your experience in life and your observation of the conduct and actions of mankind, whether such motives as are ascribed in this case are ordinary and reliable, as the basis of your judgment. When have you ever known in the experience of life that a man who had deflowered a woman had slain her to avoid the consequences? Go back in your experience of life, you who are elderly gentlemen, you who are younger. Tell me, by what process of reasoning, from your knowledge of mankind and your experience of human motive, you arrive at that conclusion which fills the breasts of the Commonwealth's attorneys, that he slew her because she stood in the way of his ambition? When your experience and observation of human life shall have called up the instances in which that

motive has inspired such a hideous and monstrous crime, then you may apply that standard of motive to the conduct of this accused. But, until then, you are wandering in the vainest conjecture as to what purpose animated his breast, and seeking his conviction not by the route of human experience and human knowledge and judgment, but in a vague attempt to frame a reason for a crime so atrocious that it has no parallel in human experience!

A motive to slay her! That girl between whom and himself, assuming the worst that the Commonwealth imputes to him, existed none other than tender relations! What is there in his nature and character to authorize you to suppose that he would slay her? What in his conduct? Sirs, you Virginia men, I call upon you to pronounce by your verdict that Virginia has never raised such a monster as that man would be if he were what the Commonwealth paints him—capable of debauching and slaying this unhappy girl. And, sirs, while a shout is ringing in your ears for vengeance, I call upon you, in the name of this ancient Commonwealth, of all her sons, do not stigmatize her, as you will, by pronouncing that such a monster has been reared upon her soil. What justifies you in support of that? What of his life and history authorizes you to imagine it? What are his vices? What has he done in these years since he left college, now three years ago this month? His life in that period has been without a stain. The Commonwealth brings from the purlieus and the sewers a pair of wretched women. One of them tells in the years gone by, she does not know when, she knew him. She cannot tell within a year of the time or fix any day or period so that he can deny it; and it was seen that the Commonwealth itself was ashamed of that sort of thing. And then they bring a girl who says that while he was a college boy he was introduced to her by the name of "Merton." And that is all the stain there is on his character. Every neighbor and every man in his county who knows him, the highest gentlemen in the state, men who bear historic names, old Virginians, the best of earth, come here to testify that in these years his life has been blameless. And against such testimony is the fact

proved by these unhappy women of 15th street and the young girl who testified here of transactions happening years gone by. There is but one other. That foul production that was introduced by the Commonwealth is ascribed to him. When it was indicted, if it was indicted by him, we do not know. But I speak of his walk and conversation in all these years as a lawyer, in the face of the public more or less, attracting attention. In all this time, those who knew him best, his closest friends and nearest neighbors, testify to his uncommon excellence of habit. And you are asked to believe that that man was guilty of this deed; that he did it, in the language of the statute, "wilfully, deliberately, premeditatedly." And against that presumption, that preposterous and unsupported presumption, I raise my earnest protest.

I pass from that question, because there are no facts to warrant that ascription of motive. This girl did not stand in his way. He need not have feared any effect upon that aunt whose favor it is supposed he was seeking by anything which might transpire between those two. You saw, we all saw, that that boy was the apple of her eye. You saw and marked that when these troubles arose at the home of the deceased five or six years ago, when she was fifteen or sixteen years of age, when she was not an experienced woman of 21, but a thoughtless girl of 16, and when these difficulties arose at her own home, she was sent to the home of this accused and lived in the house with him. When trouble was brewing and violent discussions had led her father to send her from home, he sent her to Mrs. Tunstall's and sent her to the companionship of this accused, where, with his young blood, she passed unscathed. And now, when it is argued that he seduced her, gentlemen, what opportunity had he? Just think of it. He lived 25 miles away from that girl's home. Months would elapse without his visiting her or going into that neighborhood, and he never went there, as this evidence discloses, except when he went to court once a month, or when he had special business. She lived at her father's house until July. It has never been proved that there was the slightest opportunity for, or attempt at, wrong-doing at her father's house.

She moved from her father's house after the 4th of July, and came to her grandfather's where she was living on the 11th of July when the accused paid a visit to the house.

Now that was the time he is said to have seduced her. The testimony shows that he got there late in the evening. Mr. John Walker came in from his work in the fields and found him there. Mr. John Walker's father and mother and the boy who lives there were at the house. They sat together throughout that evening and they retired at bed time, the accused and John Walker going together and sleeping in the same room. And the charge is, and you are asked to believe it, that, in the dead hour of that night, he got up from his bed, opened a door, walked into an entry, opened another door, and walked through that room and opened another door, and entered the room of the deceased, and there, in that room, in a wooden country house, where possibly you could touch with your hand the ceiling, it is said that he debauched her, and her grandfather and grandmother sleeping in the very room below and the uncle sleeping in the room which he left, he passing through three doors and opening the latch of each in order to accomplish this purpose, and you are asked, upon your oaths, to say that he then and there seduced her. Sirs, can you say it?

Then it is suggested that perhaps this thing occurred in the morning. John Walker says he got up and went out to attend to the stable and to the milking and was gone about an hour. After the day had broken, when the family were awake, while he was milking the cows or feeding the horses, it is suggested it might have happened. And you are asked to believe that this unhappy deceased was capable of lending herself to that sort of intercourse, under the circumstances that surrounded her.

Now I ask every disinterested man who hears this case to remember, upon this point of seduction, that this accused never visited that girl but once a month, when he attended the courts, or was there on business; that he lived twenty-five miles away from her, and that the theory of the Commonwealth is that he debauched her by quitting the room in which

her uncle slept passing through three doors of communication and holding intercourse with her over the room in which her grandmother and grandfather slept. And that is the purest and the wildest speculation, unsupported by a single fact in this case, except where the mind is prepared to believe all that the fancy may furnish in the form of accusatory conjecture (I will not call it evidence) against this accused. There is one little fact, for you men of age and reason in this case, that is conclusive to my mind that there never had been criminal intercourse between them. Sirs, they found one letter of his in her possession. That letter was dated in September, I think September 16th. Mark you, it is charged that this thing was done in July, possibly in August. But here is a letter written by him to her in September and there is not a line in it that an affectionate and a decent cousin might not have penned—not one. Now I appeal to every gentleman on that jury who has had year's experience of life to say if a man, corresponding with a woman with whom he had illicit intercourse but shortly before, would not, between the lines of that correspondence, disclose it in some shape or form. Would not unholy desire be kindled ablaze in his bosom and its flame be seen? Would he have stayed away for months at a time? Would his conduct, if he had been thus guilty, have been so? He was at the July King William court. He did not come near her. This 11th of July was the occasion upon which he came to Aylett's to the warrant trying, and that morning upon which he went to the warrant trial he left Walker's immediately after breakfast. John Walker got into his buggy and drove off with him. At the court he stayed at his aunt's, in the neighborhood, and did not see the deceased at all. Now you are to infer, or to deduce, that this man's conduct disclosed that he was her guilty paramour, and all because there is a fanciful theory which has been rung in your ears. And, sirs, if you start with the postulate or predicate that this man is guilty, as the Commonwealth's attorneys have started, why he has a dull imagination and a stupid power of speech who could not rouse your indignation and stir you into frenzy and wrath. But invert the process, and you have

to reason what is guilt, and not assume it and erect upon it a structure of violent denunciation and unstinting abuse.

What is the theory propounded to you? Why, that this man dominated her will; that she was as clay in the hands of the potter; that some mesmeric power belonged to him which controlled her actions, stifled her virtue, sacrificed her person to his base lusts. What evidence is there of that? Who testified to it? Where did she see him, or he her, for him to acquire this dominion over her will? They had not met, except casually, for years. She did not take his advice. Ah, yes, she did! Yes, I remember! He was asked by her for a legal opinion: Whether when she left home after she was twenty-one, being of age, she was not entitled to her trunk. He gave her an opinion, which certainly could not have cost any very great intellectual effort. He told her, "Yes, when she became of age." And that is all.

He dominated her will and controlled her actions! There are some things in this case about which there cannot be any mistake, and one of them is the contemporaneous evidence as to her movements. Look at these letters written by her in June and in August, 1884. What does she say? Now mark you, gentlemen, this is in June, 1884. She is writing to Mrs. Tunstall. She says—just think! They fix her ravishment on the 11th of July. The poor girl had then just recovered from an attack of measles. This letter is dated June 23rd, 1884. She says:

"My Dear Aunt Jane: I am quite sick, just able to be up a little, but I am going to write you a few lines at the time until I finish. I thought for some days I could not live, but thanks to my God he has spared me to be a little better. The measles has nearly all gone in, I think. Alice, Sanford and Spot are also quite unwell. Alice sends thanks for the money, and all the children send love."

"You may look for me down just as soon as I get able to make arrangements about my trunk. If I can get any one to carry my trunk to the boat, I shall come straight down to stay with you; but if I can't get any one to do that, I am going to tell papa he must send my trunk to the stage, as I am going to Richmond, and then I will come down as soon as I can. You know I could get any one to carry my trunk to the boat, but when they came for it ma and pa would carry on so they would not take it. You understand me. So the children think it best for me to go to Richmond first, and

then ma would not expose herself so much. Alice says if I were to go from here down there she never could stand ma in the world. So I don't know yet how I shall manage it until I get able to go about. I am going to see if Mr. William Turpin won't carry me to the boat as soon as I can, as I feel so sorry for you by yourself all alone."

Now, here is a letter written by her on the 23rd of June, 1884, within a fortnight of the time which it is alleged he controlled her will and dominated her destinies, and she is speaking of her future actions and conduct, and she refers to what was advised by her sister and brothers and never mentions the name of Cluverius in that connection. Then she says in August:

"I certainly do wish I could go to Richmond while you are there and go home with you, and would make it so if possible, but for ma's threats, as she makes so many. That is why I have not been down to your house or to Richmond. I thought I would do as most everybody tells me and wait until they get quiet, and then go down, as you know how they might do if I were to go now. I will try to give them *time*, and let them say of me what they may."

"I thought I would do as most everybody tells me and wait until they get quiet and then go down." So she was taking the advice of those about her as to her movements and actions, and not the advice of this accused, between whom and herself not one word or line ever passed, as far as the evidence in this case discloses, he being twenty-five miles away. While these discussions were taking place up at her home in the county of King William, the accused was down at his home in the lower end of the county of King and Queen.

Therefore, gentlemen, I ask you what foundation is there, in your reason and judgment, for the ascription to him of controlling her destinies and regulating her movements and being the master of her person? I repeat, there is nothing in it but the wildest conjecture. There is not a solid fact upon which it rests. Not one word ever fell from his lips, not one line from his pen, not one glance from his eye that is detailed to you by any human witness to show that his conduct towards this young girl was not perfectly irreproachable. And yet, on your oaths and your consciences, you are to

call that God in whose presence you stand to witness that this evidence justifies you in saying he seduced her.

It is said, and on that a mountain of conjecture is built, that he was the author of this foul production which was found in her trunk.

Before I pass to that I should have called your attention to this:

"It is agreed that it shall be admitted that Carey Madison was a suitor of Miss F. Lillian Madison from the spring of 1884 to the time of her death; but it is also admitted that the parties never met later than the summer of 1883. It is further admitted that on September 12th, 1884, she wrote him a letter expressing her love for him as being stronger than for any one else, and asking him to meet her when in Richmond and take her to the fair in October, 1884, and that she did not care to go around with any other gentleman, as she did not think it right, and signed the letter 'Your true and loving Lillie,' and added as a postscript a verse of love poetry."

Now, sirs, almost at the very moment at which these visits took place, she was conducting a correspondence which led to a declaration upon her part that she loved him better than any living man.

That she did not care to go around with any other gentleman, as she did not think it right, and signed the letter "Your true and loving Lillie," and added as a postscript a verse of love poetry.

And this was on the 12th of September she wrote to him. There had been a series of letters passing between them since the spring of 1884, more or less tender, and it culminated in this declaration of affection for him on the 12th day of September, covering the very period during which it is charged the accused controlled her will and dominated her affection.

Sirs, there are the lines of this dead girl, speaking from her grave, covering a period of which the general public knew nothing until these disclosures, and the accused has borne for months and months a torrent of denunciation and abuse as the only man who ever possessed any part of her affection, without proof that he possessed any and in the face of the admitted fact, under her own sign manual, that she loved another and was his "True and loving Lillie," and that she

would go with no other man, as it was unbecoming and improper, in view of their peculiar relations.

Suppose that had been told to any just man, along with the story of the accused having debauched this girl. Would not this just man have said, "You do this man an injustice?" Where is the evidence of that charge? Here is her own testimony to a loving correspondent stretching from the spring of 1884 till her death—letter after letter, culminating in this condition of affairs on the 12th day of September, and why should you therefore say that the accused was the master of her will and the master of her passions. She had been writing to this young man from the spring of 1884, and continued to write to him until the day of her death. This agreement further says:

"That Carey Madison asserts that no actual engagement took place between them."

Well, I do not know what an actual engagement is.

"That in no letter since September 12th, 1884, did she express her love for him, but did in one chide him for not continuing to love her."

Chided him for not continuing to love her! Her affection did not abate, but his did, or might, as she supposed, and she chided him for it.

Now all this correspondence was being conducted during this period when it is said the accused was the only man who had any control over her affections. And do not ever forget the fact, gentlemen, that 25 miles separated them. The visits of the accused were but monthly. There is not a line of his to her, or hers to him, that indicates aught else than cousinly regard; and I repeat that every man who has experience of life that is worth a straw knows that he could not have penned a line, much less a three- or four-page letter, to this girl, without disclosing in some form the character of their relationship, if it had been illicit and unlawful.

Now that was the situation in reference to these two, and if there is any fact that has escaped my mind, I shall be glad to be reminded of it. It is said, mark you, gentlemen—distinguish between what is said and what is proved—by the

counsel on the other side, with vehement elocution, that all this time he was controlling her powers and her will, that he wrote letters to her and she wrote letters to him; and they have a theory that she destroyed all his letters. In her trunk were found countless letters. There was found but one from him, and it is charged that because letters were not found they none the less existed. That old legal maxim which declares that that which does not exist shall be held never to have existed is simply inverted; and because the letters cannot be found they argue that they did exist, and call upon you so to hold. Why, what sort of language or argument is that to address to a jury of twelve gentlemen sworn to act upon the facts of this case? Why should she have destroyed his letters? What was there in them that she should destroy them? Why did she not destroy this terrible poem, that wretched stuff that defiled her trunk? Why should she have retained such a piece of composition as that and have destroyed his correspondence? What correspondence had she with him? Why, as far as we know, this letter of September 14th is the only one that was preserved by her. Shortly after, in the next month, she went to Bath. And mark you, gentlemen, this lord of her will and governor of her actions is not shown or known to have been at all apprised of her purpose to go to Bath. There is not a whisper of testimony in this case that he ever knew she had gone to Bath until she reached there. Nor is there any evidence on earth that she consulted him about it. She went there in October. She came to the city of Richmond, where she remained for three or four or more days. He was not here, he did not come to meet her, he knew nothing of her purpose to come. She got to Bath. The letters were not found. As you have heard in this case, by the testimony of Mrs. Tunstall and of William Cluverius, these letters were destroyed, they were thrown about, considered of no value. They were simply ordinary friendly letters. How often did she write? Why, sirs, you turn again to that record, which cannot be marred by subsequent manipulation—you go back to her letter of February, 1885, to Mrs. Tunstall, in which it appears, from what she says, that the old lady had been chid-

ing her for not writing oftener and said substantially, "You write to the boys oftener than to me." To the boys! What does she say in reply? "When I write to the boys, it is very little, I tell you. The last time, I just wrote a postal. And when I write to you I like to write a long letter." There is the declaration of this dead girl, made in February, 1885, that when she wrote to the boys she wrote but postals. And when she wrote to her aunt she wrote her long letters. And again, to show you about this system of dominating her will, controlling her actions, writing to her, and all that, I call your attention to a letter written November 16th, 1884, a month after she had gone to Bath. In that letter Mrs. Tunstall is writing to her, and this letter was found among the letters of the deceased in her trunk. Says Mrs. Tunstall:

"P. S. Tommie sends love, and says he thinks you might have written to him ere this; says you must write to him as soon as you get this."

There is Mrs. Tunstall's declaration made to this girl, who had been in Bath then more than a month, that the accused said to her, "You have not written to him since you were there; write to him on the receipt of this;" and sends that message through his aunt. Mark you, upon the theory of the other side, this girl was his leman, his paramour, with whom he was in constant correspondence; and yet here, writing from his home through his aunt, he tells her, after a month had elapsed since she had been there in Bath without writing to him, to ask her to write him a letter soon, and he is surprised that she has not written.

Why, sirs, is anything more natural and simple than that? And yet they would have you believe that these letters between herself and the accused were constant, and she always under his absolute control, taking no step without his knowledge or against his will. Sirs, these contemporary statements, which cannot be fabricated or tampered with, tell the story of their relations better far than any narrative which can be framed now by those who, from malice or prejudice or forgetfulness, may do injustice to both the living and the dead.

Now a very feeble attempt has been made to prove that

letters were written by this accused to this girl. While she was there, no doubt friendly letters passed between them. But you are asked to say, upon your consciences and upon your oaths, that that scheme of her coming to Richmond in January, and that scheme of her coming to Richmond in March, were concocted by this accused and communicated to her through letters written by him. Sirs, I ask you where you shall plant your foot to support it upon solid facts in order to reach that conclusion? What evidence is there that he ever wrote her a single letter in that period after January?

There were some blank envelopes found in her trunk. Here again is one of those methods of proceeding peculiar to this case, where you try this man at the cross roads, try him on the stump; where you convict him with a shout and hang him with a hurrah, and his counsel I suppose, along with him—as some cowardly dog, from whom I received a letter this morning, threatened me they would do.

(Exhibiting papers.) Now these are the letters which it was said contained the materials of this plot. Gentlemen, in the first place my eyes are not very good, but I do think there is the date of but one of these letters that can be deciphered. I can decipher but one. One seems to be October, as I make it out, and it has the post mark of "Little Plymouth." The other three have post marks and no dates. One of them then has the mark of February. These (exhibiting envelopes) have none. And yet you are asked to assume, from the finding of these empty envelopes, that they contained, in the first place, letters written by the accused, in the second place, that those letters covered the plot by which she was to write from his dictation. The theory seems to be, or the suggestion is, that these "Curtis letters," as they are called, were devised by him, sent to her, copied by her and sent by her to their destination. Now, the whole ground work of fact upon which that rests is the finding of an envelope dated in February, said to have been addressed by the accused, and finding three others not dated at all, and you are asked, as conscientious gentlemen, to say, upon that suggestion merely, that all of these facts appear from these empty envelopes, the handwrit-

ing on which is ascribed to him by the accomplished gentlemen who came here as experts to prove it. One of these gentlemen I know intimately well. The other I know but slightly. I have a very great respect for one and a respect for the other. But, gentlemen, of all the things on earth which are least to be relied upon (not that the parties testifying are not sincere) is this opinion evidence of handwriting. To an unpracticed eye, there is no more resemblance between that handwriting (indicating) and this (indicating) than there is between Mr. Alexander (the stenographer) and myself. And yet these gentlemen think they find a resemblance, and they say the man who wrote that card wrote those addresses, all of them varying as they do. Well, that is for you to say, gentlemen.

There has been a great deal said upon the subject of handwriting. I know of nothing that has undergone greater contests of latter years. You will not forget the trial of that negro cadet at West Point who cut his own ears, where half the experts in the United States were summoned, and they split about half and half and were guided in great degree by the side on which they were called to testify, not perhaps improperly, but unconsciously. I read from Wharton's criminal evidence, where it is said:

"Of unconscious prejudice another illustration may be found in the fact that the purest and most high minded of experts, in matters involving the identity of handwriting, are known to have much difficulty in divesting their minds of the predisposition as to accept as to such identity the view which is unconsciously received by them from the party who first puts the papers in their hands."

Now, such has been the effect of this unconscious prejudice that upon the subject of evidence, in one of the very latest law books, the language which I have read to you appears. Then again, I read from Section 563. After saying that expert testimony should in all cases be scrutinized, and as a peculiar reason why this scrutiny should be applied to questions of handwriting, it proceeds:

"It is well known that in cases of peculiar difficulty, when the difference, if there be any, between two handwritings is only noticeable by perceptions the most sensitive, experts, no matter how conscientious, often take unconsciously such a bias from the party

employing them as to give to their judgment the almost infinitely slight impulse that turns the scale; nor is it strange that in an instrument so delicate aberrations from its true course should be produced by attractions or repulsions otherwise unappreciable."

"If an expert could be hermetically sealed in from such extraneous influences, his judgment might be depended on at least for impartiality. This, however, is impracticable. A jury is bound, therefore, to accept the opinion of an expert as to hand writing, even when uncontradicted, as an argument rather than a proof; and to make allowance for all the disturbing influences by which the judgment of the expert may be moved."

That is the judgment upon this sort of expert evidence. Why, we learn that our friend Mr. Craig—I would not take a feather from his cap. He is an honorable gentleman. But we learn that at the house of one of the attorneys for the Commonwealth Mr. Craig was engaged in inspecting these papers.

And therefore, when Mr. Craig has his conference with our adversary, our friend the enemy, in his own house, why, you observe how naturally, without any purpose to do what is wrong, his bias would incline him towards thinking that these resemblances occurred. And I do not utter one word of disparagement, for I do not mean to disparage any witness in this case who does not in my judgment deserve it, but I call your attention to the fact, in order that you may, in scanning this sort of testimony, see what is the estimate put upon it by the most judicious and learned in the land. Now I say, therefore, that all this attempt to show that these envelopes were directed by him may be erroneous. It is mere matter of opinion, and that matter of opinion is argument, rather than fact, says this authority which I have read to you; and therefore you must treat it as you would treat every other opinion in the case: Take his letter, take this postal, take all the writing of his that is before you and say whether, in your opinion, it proves that they were written by him. And if it does, there is but one address in February, and that was utterly incapable of carrying more than an ordinary letter, and could not have borne such papers as are ascribed to him in the form of the Laura Curtis letters.

So that, gentlemen, wherever you touch, or attempt to

touch, the relations between the accused and the deceased you see doubt and obstruction in your pathway, at every step and stage. There is nothing, in the way of solid proof, to connect these two in any form by correspondence while she was in Bath and he was in Plymouth, and there is one great fact in this case which you cannot overlook: This unhappy woman had a confederate in this city. That is as certain as that the sun is now shining. Those Laura Curtis letters prove it. They were written by her in Bath. They came to Richmond. They were mailed to her from Richmond while at Mrs. Dickinson's. They must have left there as early as Saturday, which was, I think, the 8th of March. They came to Richmond on the 9th. They were then mailed by someone here addressed to her in Bath. They were brought to her from the post office by little Willie Dickinson. Therefore, it is certain she got them through the mail. They were received there on the 10th. They had come from Bath and they had returned to Bath and were received in Bath on the 10th day of March. At that time, this accused was in Little Plymouth. He did not leave there until Thursday, the 12th, in the morning, and while these Curtis letters were coming to Richmond from Bath and going from Richmond back to Bath the accused was forty or fifty miles away, at his quiet home in the country. And therefore, one of the mysteries in this case is solved by the fact that it is absolutely certain she had some confederate here who received and mailed those letters to her in Bath, at a time and under circumstances when it is absolutely certain the accused was forty or fifty miles away from the city of Richmond. That fact is certain. That little boy on the 10th of March brought those letters in the morning from the mail at Millboro, where they had come from Richmond the night or the day before. They had therefore come down from Bath to Richmond and been mailed in Richmond for Bath. Who mailed them? It is certain the accused did not. Who did? Sirs, she had a confederate here in Richmond, or possibly more than one. I will show you half a dozen tokens in this case before I close that make it plain that there were those here in Richmond who were in combination with her, and not this accused.

Where was she on that night when she disappeared from the Exchange Hotel for the entire night and when you have this accused accounted for during nearly half of the night. Some one here took those letters out of the office and mailed them again up to her in Bath. Who did it? It is simply impossible that it could have been the accused. And this, therefore, is one of the great facts in this case which are certainly established beyond all reasonable doubt on our side. Now all the challenge and claim upon the other side vanishes into thin air when you test it by the rule of conscience that you are obliged to pursue. The counsel on the other side have no difficulty in constructing their theories. They say, "Why, yes, he concocted those letters; he sent them to her, she copied them, he had them mailed in Richmond—they went back under his auspices." Well, that is beautiful sailing. Their sheets are filled with favoring gales. But how is it with you, who have to walk by a plumb line, by rule and square, by fact and evidence? What justifies you in that assertion? You cannot make it, gentlemen, and when you cannot, I know you will not.

Now, having thus sketched the sort of relation imputed to the accused, and his connection with the deceased, how is he traced farther? In January he is said to have been with her here. Mr. Archer fixes him at the Exchange; this negro woman, Winbush, fixes him there. That has been argued before you. I do not mean to dwell upon that. It is perfectly certain that if he did meet her at the Exchange at all, his relations with her there were purely innocent. He walked up to the counter, says Mr. Archer, if it was he, and asked for the lady in 66 and went up and held converse with her in the presence of the negress, went into her room. That was all that this Winbush woman proved. But that tendency to completeness which you have heard from my metaphysical friend, Mr. Pollard, sustained by Lord Bacon and others who have written in the same vein, that desire to surround her story possessed this woman Winbush, and she improved her statement from her first giving of it. It became necessary to connect the accused and the deceased *out of* the house. She

had seen them *in* the house, and she stopped testifying just there. She testified before the coroner, I think, originally, and when she comes here and testifies there is an addendum. The story wanted completeness. It was necessary to bring them together that night, and so she said, "Why, I heard him say, as he stood at the head of the steps, 'I'll wait for you down in the parlor'." Well, who had told her to say that? It gave color to the suggestion that when she was out that night, as she was all night, she was with him. I have no doubt that part of her testimony is fabricated,

Sirs, much has been said in praise of attorneys, in praise of magistrates, in praise of detectives, but nothing has been said in favor of those who deserve more praise than all of them put together for hunting up evidence, as they called it, in this case: The reporters. When one of them got hold of a subject, what he left behind was not worth picking up, and when one of them had put this Winbush through her catechism, if she knew who made her it was about as much as she did know. And therefore, it is all nonsense to tell me that this addendum to the testimony (which is the milk in the cocoanut, you observe, that furnishes the link to connect him with her the night of the 6th of January when absent from her room all night) was not coined and fabricated and fashioned by somebody else and put into her lips to detail here on this witness stand. But it is of no value, because on that very night, up to ten o'clock, this accused is proven as you have already heard from my associates more than once, to have been at the house of as estimable and reliable a gentleman as any in the Commonwealth of Virginia. So that he certainly was not with her. Where was she all that night of the 6th of January? Why, do you suppose this detective force does not know? Do you suppose the class of men who compose it and who know every sewer in this town and every rat it holds, does not know where she was that night? I believe they do, because it is a physical impossibility that a person of that kind should have remained all night out of her room in out of the way places within so recent a period and it not have been ascertained. But she was not with the accused. That is

certain. She had other associates and other confederates. That is certain.

And so, when you come away from January, and I take leave here to say, gentlemen, that there is a part of the evidence connected with the January trip that to my mind is the strongest testimony in this case in favor of this accused man. Mrs. Dickinson testified, and was allowed to testify, that when the deceased left her place in January she said that her cousin Tommie was to meet her, and I hold it to be one of the strongest facts in evidence in this case of his innocence of complicity with her in that January visit that she proclaimed to Mrs. Dickinson that she expected to meet him.

March came. She came down here. She was never in his company. I do not stop to consider these unhappy creatures who live on 15th street. She is never shown to be in his company anywhere. She is proved to have been out of his company at night until ten o'clock at least. If she got here, as she did, on the night of the 5th, the train on time, as we learn by the hotel register, why the accused, who has been derided for his religion—I grieve to say, gentlemen, that I am not a religious man in a true sense. I wish I were. But I never could speak with a sneering tone if I saw the vilest sinner on his knees. Let him pray to the God who made him, unchallenged and unreviled. But at all events, the instincts of that society in which he lives, those good people about Little Plymouth, those strong religious people up there, made him go to where those who sought the teachings of the gospel were refreshed and revived by the teachings of that great Immaculist. And at half past nine or ten o'clock—one of these young gentlemen, his college associate, testified it must have been Monday, because on Tuesday night he was at Mr. Bagby's—he was there listening to Moody, at a time when this town is filled with the story that he was gratifying his lusts with this unhappy woman. We find him until half past nine or ten o'clock at the Moody meeting, in the midst of those who were praising God with all their souls, and the next night until ten o'clock, or after, at the house of as pure and guileless and good a man as there is in this Commonwealth.

Now, I ask, while he was thus engaged, where was she? I say she had other associates than he, and that he was never seen with her for one moment within the precincts of this city. I think that is as demonstrable as that the sun is shining now. The strongest evidence of his guiltlessness with regard to this January visit is found in the fact that the deceased proclaimed her expectation of meeting her cousin Tommie, as Mrs. Dickinson said, and she spoke of receiving letters from "Cousin Tommie." No doubt she did receive them. She did not utter one word of love or tenderness, but spoke of him with that natural pride that she would feel in him. Why should she not feel proud of him? For two or three years he had stood at the bar the peer of any man practicing there, taken by the hand by the best of his profession, respected by the judges, treated with distinction as a rising young man making his way in the world. Why should she not be proud of him and speak of her Cousin Tommie with natural pride? But did she utter one word of tenderness about him? If he had been the father of her child and the violator of her virtue would she have been talking about him? Would not that secret have been buried in her bosom, where, when she thought of him, there would be a tear of agony mingled with every sigh of affection? But she gossiped about him, just as a cousin might speak of a cousin in whom she felt a natural and just pride. And who shall say her nay? But out of this, which I think is the clearest evidence that her purpose in coming here to Richmond in January had no connection with him, is derived the fact that she did come here, proclaiming her purpose to come here with him and to perpetrate some atrocity. Sirs, it is against all human reason and experience—those guides which are to determine you in your judgment of the conduct of others.

Now we come to this March visit. Not one word is said about him on that visit. He does not figure on the scene at all. There comes to the deceased a letter accompanied by a note simulating the hand and the position of a young lady of this city, and she comes to Richmond in response to that. Well, where does she come? Who meets her? She lands here at two

or three o'clock in the morning. On her road down she tells the conductor that she expects to be met by some lady friends at the depot and if she was not met there, she was going to the American Hotel. And, not being met, she accordingly goes there about two or three o'clock in the morning, and goes to her room. The next morning, after eleven o'clock, a person comes to see her—sends a note by a little negro. As soon as she gets the note she answers it and follows the answer immediately, goes out, and is gone for two or three hours and then reappears.

Now, mark you, gentlemen, the conspiracy imputed to him and her was that he was to meet her here in Richmond in this March visit and if she had come according to her intention—I wish you would note this in your memories, if it has not struck you, as I am very sure it must have done: You recollect she started on the 10th of March from Mrs. Dickinson's. If she had reached the cars in time that day, she would have been here thirty-six hours before the accused arrived in Richmond.

She left there on Thursday morning but did not get here until Friday morning, instead of getting here Thursday night. I am correct, I believe. However, she left on Wednesday morning, a day before he left Little Plymouth, and if she had accomplished her original purpose of getting to Richmond on Wednesday night, she would have been here twelve or fourteen hours before he arrived. He got here on Thursday morning about half past ten o'clock. She would have been here from the afternoon of Wednesday until Thursday morning and entirely, quite entirely, by herself; and that was her original plan—to get here on the night of the 11th, instead of the night of the 12th, and he did not start from home until the morning of the 12th, and therefore, there was no concert between them as to the hour at which they should arrive, or the period at which they would arrive, for, but for the accident of her being a little late for the train on the 11th, she would have been here on that night, instead of the night of the 12th, and have been here twelve or fourteen hours in advance of him. Now, therefore, you observe, gentlemen, not

only does the Curtis correspondence, as we call it, show that there was a confederate here, who sent it in the absence of the accused, but that, but for an accident, she herself would have arrived here while he was out of town. Now mark you! The plot is that he shall meet her here for some nefarious purpose; what, is not exactly disclosed. It seems to be hinted that she was to be met here, or that an abortion was to take place, or that she was to lie-in until her period had expired. Those suggestions are thrown out. But that they were to meet at the American by appointment. If that was so, why did he not go at once to the American? What was the difficulty in looking at the register and seeing "21" as the number of the room to which Miss Merton had been assigned, and going quietly to her room, tap on her door and see his co-conspirator? Why was he not there early in the morning? It is said that he might have ascertained that the train, at which he was not the night before, did not arrive until late, and therefore he was not present. But why was he not there earlier in the morning? Why did he resort to this method of sending her a note by a negro boy? And then, as we learn, after the note had been dispatched, why did he disappear so that the boy could not find him? What is the meaning of all that disguise? She came out of the hotel. What was the tenor of this note? I shall have much to say to you about that note. What was the tenor of this note, too, and the co-conspirator coming from King and Queen to meet her to accomplish a given object and she writes word, "I will be there, so do wait for me."

Gentlemen of the jury: In order to prepare the way to the discussions that I have to make upon the question of the identity of this accused at the American Hotel, I take leave to say that perhaps there is no caution more strictly given in the books, a caution fully justified by every man's experience, than that which urges upon every juror to be careful in weighing testimony as to the identity of a person. It is very difficult to identify any man unless we are familiar with his features. We identify him oftentimes by peculiarities of person, peculiarities of action, far more than by any recol-

lection of the peculiar cast of his features. You would find it exceedingly difficult to describe any acquaintance of your own, if you undertook to give portraiture of his actual, personal facial appearance. That difficulty of course is increased in proportion as the party's opportunities of knowledge are lessened; and a man who is a mere stranger, of whom you get but a passing glance, is one of whom it is impossible to predicate any certainty of identity. A man who rivets his picture upon your memory by some act or conduct in which you are deeply interested may be recognized by you through all time. The man who accosts you in the highway and robs you or assaults you, though you may have but a momentary view of him, is fixed upon your mind in the matter of his identification, and his features are photographed upon your memory and remain there forever. But a stranger, in whom you have no interest, with whom you have no connection except a mere passing one, is not apt to be recollected with certainty; and it is that class of testimony against which the courts are continually cautioning those who have to pass upon it. Now, the older gentlemen among you may remember, for I well remember when I was young, the identity of the famous Morgan, which was the subject of discussion in my early days. It was in the time of the high anti-Masonic excitement that prevailed in New York. It was charged that a man by the name of Morgan had been murdered by the Masons for revealing some of the secrets of the craft. Party excitement ran high and the gubernatorial election turned upon the question of Masonry, or anti-Masonry. That man's body was passed upon by three coroner's juries. He was buried as a man by the name of Monroe. His body was exhumed. The parties who testified were strongly anti-Masonic. There was a strong feeling abroad in the country and the witnesses testified that he was a Mason and the second coroner's inquest reported the fact that he was a Mason.

"In the meantime a rumor was spread that the body was that of Morgan; and a second inquest was summoned, before which very extraordinary evidence was produced. The remains had been tampered with; the head and cheeks had been shaved; and a dentist

was examined who produced two teeth he claimed to have extracted from Morgan's mouth, and which were said to fit into the mouth of the deceased. But confirmatory facts of this kind were not needed to back up the convictions of the numerous witnesses, who, under the strain of high party excitement, believed that they saw in the corpse the body of the murdered victim of Masonry. The second inquest found promptly that the body was that of Morgan; and this was followed by an immense funeral at Batavia, which was one of the most effective incidents in the political campaign. Not long afterwards, however, a third inquest took place."

Then in that third inquest they found that it was not Morgan. See 3 Am. St. Tr. 385. There was a looseness prevailing in those times of high excitement in which parties were induced to believe in facts of identity which at other times they would not have ventured to assert. Here, in the midst of the immense excitement produced against this accused by the character of this charge, many persons honestly believed that they saw what they did not see, and those who saw had but passing glimpses. Upon this general subject of identity I read the language of Lord Cockburn:

"The question being one of identity, a good deal has been said about the doubtful nature of the inquiry and the one proof which can be produced of identity and I quite agree with it, and that it is one of those questions upon which they are occasionally liable to go wrong. But ordinary cases of identity are very different indeed from the present."

And then he goes on to speak of the peculiar features of identity in the Tichborne case. In that case, gentlemen, there was this remarkable fact: The mother of the claimant undertook to identify her own child and the jury found against her testimony to his identity upon the other evidences in the case, not of persons who spoke of his features, but of the thousand facts and incidents which attended the question of identity, and proved that the mother herself was in error, though she looked into the face of the man and swore that he was her son.

"There are instances, indeed, in which the supposed recollection of the features of a person accused has proved faulty. I have known such instances myself. I remember to have been present years ago at a trial, which I never shall forget, on the western circuit, in

which two men were tried for murder. They were both convicted, one upon evidence of identity given by numerous persons, who all swore to the man. He was convicted, and if execution had followed upon conviction with the rapidity it did at an earlier time, the man would have been executed. It was proved afterwards, beyond all possibility of a doubt, that those who had sworn to the identity of the man were mistaken. He had been taken up for picking pockets on the day the murder was committed, hundreds of miles away from the place; he was in confinement at the time under the latter charge; there was not the slightest doubt in the world about it. The man was, of course, reprieved."

Now, here were persons who came in and swore to that man's identity. He was convicted upon their testimony, was about to be executed and would have been executed if it had not turned out that he was in prison hundreds of miles away from the spot where they professed they had seen him and believed they had seen him. This is Lord Cockburn speaking, within the last ten years:

"I tried a case not very long ago at Hartford, where a man was charged with night poaching, and with a most serious assault upon a keeper—the keeper having been most cruelly used. The keeper was a most respectable man, head-keeper of a nobleman in the country. Nobody doubted his perfect veracity and intention to speak the truth, and he swore most positively to the man: I had not the slightest doubt of his testimony. The jury convicted the prisoner. It turned out afterwards that we were all mistaken. It was shown satisfactorily that he had been mistaken for another man. Therefore I quite agree with what was said by the learned counsel for the defendant, that in ordinary cases identity is a very difficult point; and here it is the question at issue in this case."

Now this is the language of one of the most learned and accomplished men who ever sat upon the English bench, speaking in recent times and giving recent experience as to the danger of relying upon this matter of identity. He mentions two convictions occurring under his own eye, where honest witnesses swore to the fact of identity, one of them having been assaulted by the man, whose perceptions were sharpened, who was eager to know his assailant, and that man was in error and the prisoner was improperly convicted.

Starting with this general caution, gentlemen of the jury, the wisdom of which every just man would recognize, we come to the evidence of identity furnished by the transactions at the American Hotel. From that point, it is alleged this

accused carried the unhappy deceased to her final doom, as it has been so frequently called, in the reservoir. Now what is the evidence upon that subject? See. There is one witness who undertakes to identify this accused on the evening of that day—Friday evening. That gentleman says—Morgan Treat—that he was sitting reading a newspaper and that the accused, as he thought and remembered, though he would not be positive, as to his identity, came in through the door; the door opened and with it came a blast of wind. He looked up and thought he saw the accused and he passed him by. That gentleman said, “I would not be positive it was he; my impression is that it was the accused,” and that was all he would say as to this passing glance he had of him. When he got to the office, if it was the same time at which Mr. Treat saw him, he walked up to the counter and handed his card to Mr. Dillard. Mr. Dillard had never seen him before. He did not see the name on the card. He gave a mere glance at it, called the servant, gave the servant the card, who carried it along with the person to the parlor. He took no particular note of this individual; there was nothing to attract his attention. The act he was performing was the common one of inquiring for a guest in the house and handing his card, and he called the servant and the servant took it up to the room. Indeed he had but a passing glance of a man that he had never seen before, and that man he thought had a mustache. Well, at that very same time, there stood at the corner of the counter a gentleman by the side of Mr. Treat who had seen the accused before and knew his identity, and that man was the elder Mr. Dodson. He says he had a glimpse of the man who came with the card, just as Mr. Treat did. He looked at him. He had seen the accused before then, passing about the street sometimes and in the American Hotel at other times, and knew him; had taken him to be a Mr. Bagby. But the recollection of the features of the accused was in the mind of Mr. Dodson and when Mr. Dodson looked at this person who handed the card, just as young Mr. Dillard looked, he said he did not recognize him, and that he was not the accused; that from his knowledge of the accused, he would have recognized him, but

he did not. So that you have at that very instant of time, first, the passing glance of one who had never seen the accused before and the passing glance of one who had seen him before, and second, the man who had seen him before did not recognize him; the man who had not seen him before thinks he did.

Now upon the question of identity, upon which you are to pass, as to whether that was the man, under the rule of law which has been laid down for you by this court, that you are to be satisfied beyond reasonable doubt of every fact essential to this man's conviction, and this is one of the most essential, you have two witnesses differing about that very fact of identity. You not only have this caution which I have read you from the law book as to the danger of accepting identity from passing glances, but you have, superadded to that, the statement of one who knew the accused that, in the glance he took of him, he did not recognize him. Well, sirs, if that does not create a rational doubt in the mind of any fair man then it is in vain that there should be competing and contesting proof. If Mr. Dillard had said, "I knew this man before, I knew him well," was one of his acquaintances or friends who had come there and handed him the card, if he had said, "I saw this card and recognize the name of the man," the case would be different. But he saw nothing upon the card; he had but a passing glimpse of a man whom he had never seen before to his knowledge, and upon that testimony you are asked to say that this accused was the man who came to that counter on that night.

Nor is this all. I call your attention, gentlemen of the jury, to one most striking fact in this case. It is one of those facts connected with that whole transaction at the American Hotel that gives me pause: That man Tyler who carried that card to that lady's room never delivered it to her. He says he does not know what has become of it; it has been lost. If that card was before you, you would know whether the name of Thomas J. Cluverius was upon it. But Tyler testifies that he had it—had it after he had turned the young lady and the gentleman into the parlor together, and cannot remember

what he did with it. But he went with the gentleman to the parlor. There was no one there. The young man went in the parlor and just as Tyler was in the act of going out he saw two persons coming up the steps, a young lady and an old man, the young lady in advance, whom he recognized as the occupant of 21, accompanied by an old man; that those two people went into the parlor where this young man that he had brought up from downstairs was sitting, and that they sat down and the old man said to him, "Here's a lady who wants a room." Now, mark you, the story that is told by Tyler. It will be useful when you compare it with some other testimony in this case. This old man said, "Here's a young lady who wants a room." There was that intelligent girl who, if his statement be true, had occupied room 21 since the preceding morning at 2 o'clock, had eaten her breakfast in it, had gone out from it, had returned to it at dinner time, had gone again out of it; it was within sight from the parlor and on the same floor, and this negro stands up and tells this jury that the young lady sat still and allowed this old man to say in her presence that he wanted a room for that young lady, and that she did not open her lips, and he said in reply, "I can give her a room," and took her out and carried her to 21, where she had been not less than three or four times that day—21 being on the same floor and within sight of the parlor door, and that she in all this time never opened her lips. Sirs, it is the most marvelous tale that was ever told to a sensible jury. She was not dull; she was not terror stricken. She was an intelligent girl. And all this colloquy is going on over her head and she does not open her lips! How do you explain it? Who can explain it, except upon the theory of that magnetic or mesmeric influence always exercised over her by this accused, as we learn, which made her dumb and speechless. Aye, more! Made her an idiot. And after going to this room she was in the presence of this accused. They were together in the parlor. Not a word passed between them, not a sign of recognition, and the young man said to Tyler as he went out and passed out of the hotel, "That is not the young lady I wanted to see." She had gone to her room. He left the

hotel at the same time with the old man, went down the steps of the ladies' entrance and went out of the hotel. In Tyler's colloquy with the young lady, Tyler says he said, "There is a young gentleman there that says you went to school with his sister that wanted to see you." She replied, "Well, where is the young man?" He answered, "I'll go and see if I can find him," and he went down and in a few minutes the young man came around into the office of the hotel again. Mark you, gentlemen, Tyler has varied his statement between the coroner's inquest, where he testified, and his statement before you. He puts those words into the lips of the young man before you. In the trial before the coroner's jury he puts them in the lips of the young lady. But he says, "I saw the young man and told him that the young lady said she would see him, and thereupon I went back to the parlor with him and went to her room and she came and I left them together."

Now that is his statement. Mark you! The statement he makes with reference to the original appearance of these two parties is improbable and unnatural. His identification of this young man is not only vague in itself, but is contradicted by his own conduct and action as detailed by himself. You heard what I read from the statements made before the coroner's jury, where he testified. He described this young man as a half a head taller than himself, a slim young man with a mustache; that he had on a derby hat and a reversible overcoat, both of which he had on before the coroner's jury as he stood before Tyler while he testified, and he said, "I recognize him by that derby hat and that reversible overcoat." He made some parleying here about the reversible overcoat, but he said it before the coroner's jury. He made no parley about the derby hat, for that was one of the items upon which his identification was predicated. And then, on that very night, after this party had left, as he says, he met a young gentleman who stayed in the hotel and asked him about the young lady that he had gone out with. He had confounded another guest at the hotel with this accused on that very night. He said that he brought this young man up from the office. There was that glare of light upon the occupant of 17.

He came into his room and asked him that question. He says, of course conveniently enough, that when he turned up the gas the young man said, "I didn't go out with any young lady." And then he said he saw he was not the man. But he had taken him for the man when he asked the question. To show how little the actual identity of this accused rested in his mind, he himself, within a few hours after he had seen him, asked another if he was not that man.

Now, sirs, when you are asked on your consciences to pass upon this question of identity, you are asked to accept this man's testimony as to identity who did not rely upon it himself. That witness is asked again, "Did you see any other guests there that night?" To show you how imperfect his recollection is I will call your attention to this. It was his duty to superintend the rooming of the guests for that night. That was his business, he testifies. And on that very night there arrived five passengers on the 9:30 train by the Fredericksburg road, an elderly gentleman and his daughter, another gentleman, his wife and a little child, and they all came in the ladies' entrance and went into that parlor, and they were carried to their rooms by Tyler, as was his business, and yet that man says he has no recollection in the world of seeing a single one of these guests, and therefore, Dodson says, the real fact is, and he has no doubt about it, that this young lady and the old man whom Tyler professes to have seen were this lady and gentleman who came in on the 9:30 train and went into that parlor.

But when you get to this question of identity you find them all conflicting. This last witness who testified said that the man who came in was a man about forty years of age, not an old man. There is doubt all over this matter of identity, and I believe it is the solemn truth of this case that those two that Tyler saw come in, and that the others saw come in, were the guests who came by the Fredericksburg road, as the register shows and as Mr. Dodson remembers, and who went to that parlor, a young lady and a gentleman answering as near as may be to the description that Tyler gives of this old man and young woman.

Now, sirs, that is all the testimony with respect to these parties, except the testimony of Gratton, another servant there. And what does he say? Why, he says that these people came back into the parlor between seven and eight o'clock. He differs with Tyler in respect to those who came in, nearly or quite an hour in point of time. There is no agreement among them in any respect. They are all testifying of a person that they have never seen before. They are speaking of a man whose countenance did not and could not impress itself upon their memories. They speak after the lapse of considerable time, with no link to hang their memories upon, and, therefore, the testimony of identity is not proved with that clearness and certainty which is required.

Now those are the transactions in the American Hotel. Tyler does not profess ever to have gone back to that parlor after he left these two persons in there, according to him, somewhere about twenty minutes to nine o'clock. No one ever saw him or heard him leave that hotel. I do not believe, gentlemen, and I shall never believe, that this deceased ever crossed the threshold of that hotel after she left it about 6 o'clock in the afternoon. I believe that she never came back with this old man at all, and there is no human ingenuity which can account for what took place in that parlor when these people were face to face.

Now, mark you, it is charged that he and she were here by concert. If Tyler's testimony is true, they had never seen each other before that day, they had never been together at all, because she said and he said, as Tyler reports in the one case and in the other, that she thought he was the young man with whose sister she had been to school and he thought she was the young lady with whom his sister had been to school. But it is manifest that when they turned their backs upon each other, she going to her room, 21, and he going down the ladies' entrance steps and going out of the hotel, there was no ground to suppose that they knew each other or intended to meet each other, because, if Tyler's testimony is true, the young man within some five minutes afterwards entered the office of the hotel and he saw him by mere accident and ac-

quainted him with what had passed between the young lady and himself, and thereupon, he says, they were carried to the parlor together. But if his story is true, she had gone to her room and gone for the night, and the person who was seeking her had left the hotel, and their subsequent coming together was the result of mere accident, if it is true they met at all.

Now, sirs, this is the state of the proof as to that night at the American Hotel. How can you say, gentlemen, that the identity of this young man is proved, in the face of Tyler's own doubt in respect to it? They left the hotel, it is said. Then comes the next step in this scheme. Mark you, you are to trace them step by step to that reservoir. You are to do that by solid, substantial facts. If what I have already related does not throw a doubt over the identity of this man, then there is no force in reason or in deduction. And I do not believe that any just man, with his hand upon his heart, can say that it is proved beyond a reasonable doubt, proved to a moral certainty. Why, sirs, what do you mean by a moral certainty? That has to be determined by your own consciousness. Suppose your own brother stood in this prisoner's place, or your son. Would you condemn him upon this testimony? Suppose your friend sat there. Would you say "the evidence of his identity, from these passing glances, was such as that I can face my Eternal Judge and say I have a moral certainty; I know by the aid of my reason and judgment and conscience that that is the man, and I am prepared to stake my future accountability upon it"?

Now, sirs, what is the next step in this proceeding? Why, they profess to recognize this couple, a couple who were never seen to leave the hotel by any human eye, with having been upon the street railroad car, and you have this tug-horse man, and it would take more than two horses to pull any sensible man into the belief of his statement. At night, across the street, he hailed the car, he ran and jumped on the front platform and saw these parties through the closed windows. Mr. Williams testifies that the car windows were all down and the glimpse the tug man had of these parties was through the closed windows, those foggy panes of glass on the front

platform through which he looked into the car while they were sitting there. And yet he swears with the most abounding confidence. Williams does not remember that the tug-horse boy got up there at all. He had run way out of his place, but with the most abounding confidence he testifies that he recognized this couple, and recognized this accused as one of them. Sirs, do you believe it? A man that he had never seen before and of whom he got this passing glimpse afterwards! It is said they went in that car out to Reservoir street. Is that proved? Mr. Williams has no recollection that any such couple got on at the American Hotel. He does remember that a colored man, perhaps one or two persons, got on between the American Hotel and the post office. But he remembers no gentleman and lady getting on. He does remember that a gentleman and lady got on at 15th street and went to the end of his route. When the car had stopped, these parties got out. And then what occurred? Mark you! The object is to prove the identity of these two, one of whom it is alleged was the accused. When he got out of the car he turned and asked Mr. Williams whether that was Reservoir street, or what street that was, and he asked him what house was that—Morton's Garden, mark you! It has been proved that this young man was two years at the Richmond College, not far from Morton's garden. A more conspicuous place than Morton's garden, every gentleman on that jury knows does not exist upon Shocco Hill, and a better known street is not in the city of Richmond than Reservoir street, a broad, wide avenue by the side of Morton's garden. And this man who it is said had this deadly purpose in his mind, turned around in his tracks to go to this car conductor to show himself to him and to ask him questions which, if this accused was the person, he could answer as well as or better than the car driver himself. Mr. Williams won't identify him, but he describes the person who addressed that question to him as one who had a light mustache, and hair around his ears tending to curl. Now, it is proved by the common consent of every man in this case on both sides that on the morning of that day that man's hair had been clipped short in the barber

shop and his face had been smooth shaven, and Mr. Williams, a conscientious man, when he is confronted with him, says, "I can't recognize that man; I won't identify him; he looks something like him, but I can't say he is the man." And yet you gentlemen are constrained, if you follow the lead of the counsel for the Commonwealth in this case, if you walk by faith and not by sight, if you follow your imagination, as he has done, and not the solid facts in this case, to say upon your oaths and your consciences that the man whom Williams saw was the accused, when he, with his hand upon the gospels and his eye upon his Maker, refused to say. Now, why should you do what he cannot and dare not do? It is asking too much from conscientious and honorable gentlemen.

And again. They were met upon the opposite side of the street. Says Mr. Williams, "They went up on the left hand side of the street." Said Doctor Stratton, "I met them on the right hand side of the street," and that gigantic individual turned and asked him the time of night and startled him with the idea that he might be assaulted, and he told him the time of night. Now what did he tell him? Dr. Stratton says he took out his watch and went to the edge of the sidewalk, where the light could be brought upon the face, to give him the time of night; that one of the hands was off his watch; his watch was not keeping time; it was some twenty-five minutes too slow; but he knew his watch was wrong, and he told him it was a quarter of nine o'clock. Now is it not fair to suppose that Dr. Stratton in giving that hour allowed for the twenty-five minutes. Gentlemen, it is one of the marvels of this case how the evidence grows. When Dr. Stratton first gave his testimony before the coroner, he said, "It was quarter past nine o'clock, because I looked at my watch and saw it," and he did not whisper a suggestion that there was any error in the computation of time. That memory came to him after he had given his testimony upon his solemn oath and fixed the time at a quarter past nine. It is doing him no injustice, therefore, to suppose that if his watch was in the condition in which he knew it was, when he gave the hour of quarter past nine, he had allowed for the defective working of

his watch and struck off or added to the time. It is fair to assume that he would not have forgotten that when on oath, sworn to tell the truth, the whole truth, and nothing but the truth. He swore he told him it was quarter past nine o'clock and that his subsequent recollection came to him that his watch was wrong, and therefore he thinks he gave him the wrong time. You will observe that a quarter past nine o'clock demonstrates that the couple that were seen by Stratton was not the couple that left the cars. And that stood recorded upon the coroner's inquest returned here as an official paper. The cars stopped at twenty minutes to ten o'clock. That was the time they left Mr. Williams. They had gone some little distance down Reservoir street, and if Stratton saw a couple at a quarter past nine it could not have been the couple that got off the cars at twenty minutes to ten. Now upon that principle which you have heard so frequently announced from the authorities during this trial, that honest men—and I do not charge Dr. Stratton with any dishonesty—may convince themselves, where public attention is aroused, where the whole city is agog with this thing—may persuade themselves that there was an error in this computation of time, you add twenty-five minutes to 9:15 and you perceive it gives about five minutes for them to walk from the car to where Stratton saw them. But let the statement rest where he first put it, where we have a right to claim it shall stand—because I believe that when Dr. Stratton gave the hour he allowed for the difference in time and that his subsequent recollection is at fault. But what did he know of the two. He does not describe the man at all. He does not pretend to recognize them, does not come as near to recognizing him as Williams does. He gives you no aid whatsoever. And that is the last that was ever seen of these two persons who are supposed to have been the accused and the lady occupying 21.

Now I ask, gentlemen, can you, upon your consciences and upon your honor, say that it is proved to your satisfaction, and beyond a reasonable doubt, that the accused left the American Hotel with the deceased, was on that car, left that car, was on Reservoir street on his route to the reservoir?

If you can say that, this case is ended. That you cannot say that is too plain for doubt. That you cannot take Stratton's testimony and Williams' testimony and pronounce upon them a judgment of conviction against the accused is plain, because they did not identify him. Before you can accept the evidence of his identification, it must be proven by them that they identified him. Neither one of them will say he did. And you are asked, upon your consciences and your oaths to say they did, in spite of their refusal to furnish you that testimony. Now I say, gentlemen, that it is in vain to turn this controversy into a mere matter of declamation and rant. It must be proved, step by step, and I will submit to any fair man on earth whether the testimony of these two last witnesses, Stratton and Williams, does not dispose of the question of this man's identity finally and forever. If I have misrepresented their statements, or those of any of the other witnesses, I beg you will correct me. If I have understated what Williams says, and understated what Stratton says, I shall be glad to be corrected. I say they both said they did not identify this accused, and you are asked to say, upon your oaths and consciences, that they did. Gentlemen, you cannot do it and you will not.

Now while it is a matter of inquiry as to this note that was sent in at the American Hotel in the morning, all that class of questions is of secondary importance when you come to trace the movements of those people in the evening, and there is no human eye that saw them leave that American Hotel, and no human eye that identified them when they passed up Main street and to Reservoir street. And upon the subject of this note in the morning, let me stop to offer you one or two suggestions. Gentlemen, it is one of the most remarkable facts in this case, to which I call your attention, and I call the attention of every man who has heard the testimony already. It is said a boy brought in a note. The presumption is it was sent by Thomas J. Cluverius because the answer was addressed to Thomas J. Cluverius. That boy is said to have been a newspaper boy and this town has been ransacked to find him. Every man, woman and child in it

has been a detective for the purpose of ascertaining who that boy is, and whether it was done or not I do not remember, but it was suggested in the newspapers that they should put out what we used to call in old times a "noration" in the African churches, and I suppose it was done for that boy to turn up. Where is he? Who secrets him? Who has swallowed him? Cluverius went away the next morning and unless—and I do not say that you should not accept that theory as well as any other propounded upon the other side, unless he drowned him in the river—and then I suppose you would have a hullabaloo from somebody who is connected with him, unless he drowned the entire generation, and yet here in this city, in the midst of the excitement occasioned by this case, within a few days after this body was found, with the entire city agog hunting for this boy, he has not been found. It is my opinion he has been secreted. I do not believe, and I do not believe any sensible man will believe, that a boy could have gone into the American Hotel in the broad daylight, a newspaper boy, and have concealed his identity through all this time. This accused left the next morning at daybreak. He was in King and Queen until he was arrested. He has not been abroad to manipulate this boy. But somebody who is interested in keeping that boy out of sight has succeeded; because if there had been a boy missed, if he had gone away, except with the knowledge of those who were interested to conceal him, the fact would have been known, and I state it as one of the most striking circumstances in this case that that witness, who of all others on earth, could identify this accused as the person who sent that note, has been suppressed by somebody interested to suppress him.

Now that note came by him. Who ever saw the direction on that note? Who ever saw what was written on it? Mr. Dodson said the note had an address. I do not think he is absolutely certain of that. I think, however, he said it had an address, but he did not say what the address was. The card that Tyler had has been lost. The boy has dropped out. This note lay upon Mr. Dodson's desk from Friday about 11 o'clock until the following Saturday evening, when, without

looking at it, he tore it up and threw it into the waste box, a box full of papers, and then he, assisted by Jack Wren, hunted and found that paper. How was it possible for Mr. Dodson to have identified this as the paper that he saw. The paper that he tore up had four sides. The note was written on an ordinary piece of note paper—an ordinary sheet of note paper. This little scrap that you have here is all of it (exhibiting same).

Now, I do not want to be mistaken about these statements. I repeat, and if there is any question about it I will turn to Mr. Dodson's testimony which lies before me—I repeat that he says what he tore up was on a sheet of paper, four pages, and this is all they got, that little scrap (exhibiting same), "Will be there as soon as possible, so do wait for me."

Now the letter that was addressed, mark you, by a supposed confederate, who came down here for the purpose of meeting this accused is responded to by the deceased, "Will be there as soon as possible, so do wait for me." As if the note had said, "Come along, I am in a hurry," or something. A man who had come here for no other business, it is said, than to consummate some plan to enable this unfortunate girl to pass through her hour of travail! And yet this note is written as if it was to somebody who was in a hurry to get away from a place and she asks him to "wait," adding that she will be there as soon as possible; and she hurries out of the hotel almost as soon as the note is gone.

Now, gentlemen, how do you interpret that? Who has interpreted that for you? That little scrap is found there. Where is the balance of this sheet? Who can tell? And I was very much struck by this scrap. If you look at it for yourselves, you will see that a most remarkable gap is between that "e" and that "l" (indicating), the "e" being principally upon one side of that chasm and the "l" being a long distance on the other. It is not at all impossible that somebody may have substituted this document for that which Mr. Dodson thought he recognized. He had never seen the name of T. J. Cluverius. It was not until after this thing had been put together, having been found in the waste basket,

that he saw the name upon it and then took it to be "Clements," I think he said, and then hunted through the directory for the name and could not find it. It was not until this scrap was taken, I think, by Jack Wren to Mr. Quarrels when he deciphered the name of Cluverius. But I repeat, you look for yourselves and see. It is not at all impossible, looking to the fact of this boy's suppression, looking to the other circumstances of this case, that whoever was interested in personating him got up this note and deceived Mr. Dodson; because I aver, and every sane man will agree with me, that if she and he were in concert and had come to the city of Richmond to carry out the agreed plan, she would never have written to him in that language. She knew that he came on purpose and would stay to meet her, that that was his only object, if such was the conspiracy, and this language, "Will be there as soon as possible, so do wait for me," implies that this man is likely to go away, and she implores him to *wait*. And the charge is that they came down here to consummate a scheme in common, and that was his only business and purpose.

Now, gentlemen, there are, as I said, mysterious circumstances connected with this note. Mr. Dodson may honestly—and he is an honest gentleman—have been imposed upon. He had never seen that name upon it. Somebody who professed to be hunting for it might have substituted this note. The contents have neither sense nor reason in them. I mean, upon the theory that there was a conspiracy between these parties. And that is one of the things which you in your retirement will consider and will have to explain to your satisfaction—one of the added mysteries of this case. Now it is said, gentlemen, the moment this note was received that proves it was T. J. Cluverius who had written the note to which this is a response. Does that follow as a necessary consequence? Does it prove, if it was T. J. Cluverius, that he was to meet her for any improper purpose? Does it show that he meant to murder her, or tend to show it? And then you have all the circumstances of this case transpiring at the American Hotel, which I have gone over perhaps more in detail than was necessary, because they have been traversed in a large

measure by my associates. But this case cannot be too much presented to a fair and just jury. It is a case depending upon that class of testimony which is the most dangerous to act upon—circumstantial testimony, and every just man will want to hear all that can be said upon either side of the case.

Sirs, upon this subject of circumstantial evidence, let me tell you, so dangerous has action upon it been considered that in some of the state constitutions a man's life is not allowed to be taken upon circumstantial evidence. By the laws of some of the states, commutation shall be granted where circumstantial evidence is the groundwork of any conviction.

"In Illinois, in 1841, three brothers named Traylor were arrested on the charge of murdering a man named Fisher, who, when last seen, had been in their company. Strong circumstantial evidence was produced showing the traces of a death struggle in the spot where the homicide was alleged to have been committed; and the case was fortified by expressions alleged to have been subsequently used by one of the brothers as to his having become legatee of the deceased's property. The examination had scarcely finished, before one of the three defendants made a confession, detailing circumstantially the whole transaction, showing the previous combination, and ending with a direct statement, under oath, of the homicide. Fisher, however, made his appearance in just time enough to intercept a conviction; and the only way of accounting for the confession which had been produced was that the party who made it, in the desperation of impending conviction, took this method of cutting short suspense."

There they not only proved the guilt of the accused by circumstantial evidence, but the circumstantial evidence seemed so strong that the party himself confessed his guilt, and after his confession the person alleged to have been murdered walked into court.

A similar case occurred in Vermont but a short time ago. (See 6 Am. St. Tr. 73.) And I have received within the last few days two newspaper slips, one from Fredericksburgh, which I will not trouble you to read, of an execution of a man in the county of Caroline for murder, when it turned out that a person in Missouri, afterwards executed on the gallows, confessed that he had done the deed and sent back to the family the watch of the murdered man.

Gentlemen, before taking a final leave of the occurrences

at the American Hotel, it is my duty to meet a piece of testimony which has been, and I suppose will be, very much relied upon by the counsel on the other side and which, upon this question of identity, looks formidable, until you examine it in the light of the rules that have been laid down for testimony of that class. I do not fear at all to encounter it, and though I have a very great respect for the gentleman who gave it, I believe that he is in a state of self delusion, and I think that that can be demonstrated. Perhaps the most specific evidence in this case was given by Mr. James. He said he met the accused and Mr. Pollard that morning somewhere about eleven o'clock, at the door of Messrs. Warren and Quarrels, some three or four doors above the American Hotel. He said he spoke to Mr. Pollard. He did not remember speaking to the accused, but he saw him and identified him. Passing along thereafter on that day, between the hours of eleven and four o'clock, he saw, or thought he saw, the accused and the deceased standing at the corner of 12th and Main streets, a little retired from the sidewalk, the lady herself standing down in the direction of 12th street near the window of the American Hotel, Mr. James passing along the sidewalk of Main street. He said he observed them as he passed. He described the lady, and you will observe, gentlemen, perhaps, the most remarkable illustration afforded by this case of the danger of attempting identification by casual views. He described the lady as neatly dressed, of handsome appearance, with laughing face, and the gentleman standing with her. You recollect the gentleman from Belle Isle, the principal gentleman there, who testified before you. You recollect he described the couple he saw over on Belle Isle, and nearly all the witnesses so described her except one, who spoke of the lady as "a noble looking, handsome lady," while another said the moment he cast his eyes on her he thought she ought to have been in the house; he saw at a glance her condition. How much of that was the result of self delusion you will decide. Because all the others who spoke of her did not observe that condition in the slightest degree, and this gentleman said, as the others said, that he took them to be a country

couple, having a valise which he described, on their way to visit some friends who lived on Belle Isle.

Now Mr. James, who is a city man, as those of us who know him well know, though not by any means a fanciful dresser, is a gentleman of elegant tastes, and has a good eye for beauty, both in person and in dress, and he describes this lady as not extravagantly, but well dressed and in laughing mood, and the gentleman as well dressed. These witnesses to the identification of this gentleman differ. Why, a witness stood up here and said when he saw this man in the country he took him to be a dude, his dress was so unlike the dress of the countrymen there at King William courthouse where he saw him. He took him to be a dude! That is a modern phrase the exact meaning of which I do not understand. While some describe him as a countryman, others describe him as a dude. Mr. James described him as rather a city gentleman, handsomely attired, and all that.

Well, he passed by them, he glanced at them, and what did he say? Now, mark you, I am trying this question of identity. What did he say? He had seen the accused a few hours before in Mr. Pollard's presence, and he says he thinks he had seen him before at his own store, and yet he tells you that, as he looked at him, he took him to be a gentleman from Georgia by the name of "Harrold," and walked across the street with that impression in his mind.

But on a second look I saw this gentleman still standing there was not Harrold. How do you reconcile the fact now, upon this question of identity, by passing glances? Why should Mr. James have confounded a man that he saw a few hours before with a man in Georgia whom he might not have seen for months? Why should there have been any impression on his mind with respect to Harrold when the person standing there, if it was the accused, had been in his presence but a few hours before and he had seen him before that time? It only shows that he was doubtful of his identity; that while he believed it was the accused, still the impression that it was Harrold was in his mind and he carried it across the street with him and looked back with it in his mind? It had not

been removed when he crossed the street. Hence it is, gentlemen, that these passing glances of identity are to be taken with great allowance. No time is fixed anywhere from eleven o'clock until four. Mr. James cannot remember where he had been. He cannot remember the men who spoke to him about that time—cannot remember some person who knew him and whom he knew speaking to him. And yet he has persuaded himself, I have no doubt honestly, that he saw this couple standing upon that corner.

Gentlemen, I pass away from the subject of the American Hotel, and the identifications there, and proceed to consider the other great facts in this case. Failing to establish that he went with this unhappy person to the reservoir by the evidence of those who saw him go, they introduce, for the purpose of connecting him with the ground and putting him upon the scene, a key which they ascribe to him. And they say, "Though we have not been able to connect you by any sort of reliable testimony with an actual personal presence on that spot, yet we find, and trace you by, an article of property which belongs to you that was found upon that ground." Sirs, I shall not traverse what has been so well said by my associates in this case. There is a great mystery about that key. The same hand which fabricated that note, if one was ever sent with the name of "T. J. Cluverius" to this unhappy girl, might have prepared everything else to hold him responsible for this crime. And this key is said to be his. Who proves it? I do not mean to stop to discuss what has already been discussed: The fact that he took this charm chain from his watch, as one of the items of suspicion, but I come to the evidence that you have to act upon that this key was his. And if it was not his, if it is not proved to be his by incontestible and solid proof, then that element upon which this conviction is asked is scattered into thin air and your task is ended.

Now, sirs, what is the evidence that it is his key? You have already heard the testimony of those who pretend to have seen him wearing such a key. No man who pretends to have seen him wearing such a key ever had it in his hand. Mr. John

Walker thinks he saw him with such a key the last of January, hanging to his watch chain, when the testimony is overwhelming that he never had such a key. All Plymouth, every man who knows him, has come here to testify that he never saw him with such a key as this. The men who know him have seen him with a key larger than this, with a red stone in the end of it. But no human being from down there in the village where he lives, where they saw him day in and day out, has been found. However, that county has been ransacked by detectives who have lived there by the month, to testify that he was ever seen to wear such a key. On the contrary, every intimate friend, gentlemen of the highest character in the state, have come here to testify that they never saw him with such a key in all his life; that they have seen him with this other key, but never with the key found at the reservoir; and while that testimony is negative, it is powerful testimony.

Sirs, take it home to yourselves. You have friends and acquaintances who see you day in and day out. They see your trinketry and your jewels. You are charged with wearing a particular watch key, and you call every friend you have who lives around you and they say, "We have never seen him wear such a key as that." Why, strangers are called. Judge Foster, sitting on the bench at King William, says he thinks he saw him with such a key as that but he won't swear to it. A man by the name of Gatewood said, "I think I saw him fingering such a key when I saw him arguing a case. Then he was not within five feet of me"—strangers to him and to it. And Mr. John Walker says, "I think I saw that key, though I did not have it in my hand, attached to his watch chain, when I was there in the latter part of January." He does not swear to it positively. He thinks so. And yet, while I mean to say nothing in disparagement of Mr. John Walker, there is not a gentleman upon that jury who does not know the strong feeling which he has in this case. I do not mean to say unnatural feeling, but give him credit for the most entire integrity. Mr. John Walker's testimony, if it were most positive, should be taken with some allowance. But when it is doubtful and halting, as "I can't say that that was the

key," and you are asked to say upon that testimony that it was the key, in the face of the unanimous testimony of all his neighbors and friends, I ask how can you do it? That excellent old lady, Mrs. Tunstall, said she had never seen him have such a key and he never had such a key. And at last the whole question of identity turns upon the testimony of Joel. And what does Joel say? The most that he can be got to say is, that the accused is very much like the man who brought him that key, or brought him *a* key.

Now, that is upon the question of the identity of the man. Mark you, the identity of the key is one thing; the identity of the man is another thing. Upon the question of the man's identity the most that Joel will say is, that he looks very much like that man, but that he will not be positive that he is. And you gentlemen are asked to take Joel's doubts and be positive, when he will not. And then when Joel is pressed, what does he say? He is asked, "When did you see that man?" "Why, I saw him, or thought I saw him, when I was at Centerville." "At what time?" "I don't know what day of the week." "What did you charge him for the key; what did he pay you?" "I don't know. I have put down these things," he said, "in a book. My recollection is that I have put down and charged this key to the person who delivered it to me for repairs, in a book, and that book was down in West Point at Mr. Bland's, or in Centerville." And the evidence in this case shows that that book was delivered by Mr. Bland to Nowland. Joel testifies that when that book got to him there were two leaves torn out which might have contained this entry. Nowland is not here to explain the condition of that book when he got it. There might have been three leaves, or four leaves, torn out that contained the entry of this key in some other man's name. Nowland does not come to explain the condition of the book when he received it. But Joel testifies that he had a duplicate book in his own possession. Let me show you what he says upon that subject. He gives no account of this duplicate book, except that he could not find it. Why does he not produce the book which was in his own possession, which was a duplicate of that in Mr.

Bland's possession, which might or would disclose the fact as to whose name was registered as the owner of that key?

Now, sirs, where is that book? There were no leaves torn from that duplicate. And now, mark you, what does he say upon the question of the identity of this accused? The most that he will say is that he looked very much like the person he saw. Remember, gentlemen of the jury, he says he heard all about this Cluverius matter, all about the key; as soon as he saw a statement about the key, it popped into his head that the man for whom he had repaired the key might possibly have been the man he saw, and he thought it possible he might be called as a witness, and that thereafter, mark you, he saw this man's effigy, his portrait, in the Dispatch, and thought he recognized that portrait as the portrait of the man for whom he had repaired the key. Now that is his account of the mode in which he identifies the man.

Now let me call your attention to the proved facts in this case to show that that statement is not true and cannot be true. On the 6th of January, last, about two months before the subject of this key came up, this accused had stood in Joel's store, face to face with him, and threatened him with prosecution if he did not deliver up that watch, and had signed a receipt for that watch, which was produced here in court. You will remember that Joel does not pretend ever to have identified the man for whom he repaired the key as the man to whom he delivered the watch. He had seen this accused face to face in January. He had had a somewhat angry colloquy with him over the subject of this watch. The accused had been twice to his house on that day, and yet when the subject of this key was mentioned it never occurred to Joel that that man who had been in his store on the 5th of January was the man who had given him the key. So that his recollection of him had passed out of his mind absolutely and completely. Because if he was speculating about the key and recollected that it was possible that the man for whom he had repaired the key might be the man, he would have known it on the instant and would have stated on the instant that the man for whom he repaired the key was at his house on

the 5th of January. And yet, sirs, you did not hear him mention that the man who was in his house on the 5th of January was the man for whom he had repaired the key. He saw him then twice that day. The accused signed a receipt with his name, "T. J. Cluverius." Joel delivered the watch to him and does not pretend that he identified that man who stood face to face with him then as the man for whom he had repaired the key. It is therefore demonstrated that the recollection of the man for whom he had repaired the key had passed from his memory absolutely and entirely. He says that when he saw one of these effigies in the *Dispatch* he thought it was the man. I hope it was better than some of the portraits they have had in that paper. With the gentleman's leave (Col. Aylett) I will tell you an incident that will relieve somewhat the tedium of this case. A gentleman stopped me on the street the other day. Said he: "I must tell you of a good joke. I happened to open a paper and I saw your likeness and I casually remarked to my wife, 'They have got the old man in here.' 'Ah?' said my wife. 'They have found the old man?' Taking the cue at once, I said, 'Yes,' and thereupon I folded down the paper where your name was disclosed and handed it to her. She looked at the picture and said, 'He does not look like he was a murderer'." That, by way of illustration. I do not mean to say that the picture that Joel saw in the *Dispatch* was as bad as that. But the picture awakened Joel's memory. The man's face did not, and his presence did not and his conversation did not. But Joel had a revelation when he saw one of these effigies in the *Dispatch*.

Gentlemen, it is asking too much to ask you to believe that Mr. Joel identifies that key. He does not identify it and will not identify it. He cannot do it. He says himself it cannot be done. He speaks of his books. He says that the key was shown to him by somebody who brought it from Jack Wren's. Jack Wren says he sent it around to be examined. Joel said he looked at it, did not take any notice of it. I think he said he did not take it in his hand; he was busy about the lamps, or his business, or something; but he said he did not know

anything about it, although the person who came to him asked him if a young lawyer had ever given him a key to repair, and although it had not been two months since that young lawyer had been face to face with him, quarreling over some matter of a watch. And then, as if this identity was to be helped, they turn aside and denounce the accused because this old negro who was on the stand said the accused got two dollars and a half out of him when he was not entitled to it; that the old negro expected him to do what he did for nothing; that the accused told him he would charge him nothing and he charged him two dollars and a half for getting the watch which had been in Joel's possession for twelve months, etc. But what has all that to do with the mere fact of identity in this case. Who proves that this key was the key of this accused? Certainly Joel does not. It is a mysterious thing, that key. Its whole history is curious. This key was not found upon the spot, at the time, gentlemen of the jury. A day and more, nearly two days had elapsed—Saturday, Sunday about one o'clock. This body was found about seven o'clock in the morning, and Sunday at one o'clock this key was found under the most extraordinary circumstances. You have heard that subject discussed. I shall not discuss it further. But I do beseech you, in passing upon this question of the identity of this key, to say whether Joel has proved it. And you know, from his own lips, that he cannot identify the man who brought the key; that all he will say is, "I am not positive, but he looks very much like the man." Now, sirs, is that enough, in the face of this testimony that no such key was ever in the possession of this accused, by the testimony of any person capable of forming a judgment?

But that is not all. There is one fact in this case to which you cannot shut your eyes. It is a fact proved by a Commonwealth's witness, a fact that settles this question beyond dispute, and that is the testimony of this man Hunt. Now, gentlemen, it is vain to attempt to fritter that testimony away. He has been traveling around this town with Jack Wren, hunting for the boy who carried the note to the American Hotel, and how often he has seen him is not known. But

before the coroner's jury and before this prosecution began, before there was what we call a *lis mota*, when had had no interest and no motive for departing from the truth, within two days after the event—on Sunday, I think he testified, or perhaps on Monday—on Monday before the coroner's jury and upon his oath, he testified that he had seen that identical key upon the bureau in the room of this young lady, and he said that when there was no one to gainsay him, when there was no prosecution against this accused and no one had any motive to induce him to depart from the strict line of truth, and he said it on his oath, with his memory fresh. From Friday about eleven o'clock until Monday, was all the time that had elapsed. Friday, Saturday and Sunday had scarce passed by when that negro swore he had seen that key upon the bureau in the room of that young lady. Sirs, it is not a matter of marvel that every effort on earth should be made to explain away that statement. It cannot be explained away. It has not been explained. For we not only have Mr. Minter to swear to the exact language, but we have Dr. Taylor, and we have that singularly upright and intelligent gentleman, Justice Richardson, to prove that that statement was uttered by him, and that the statement written down by Mr. Minter was read over to him; and therefore you have before you the fact, to which you cannot shut your eyes, that this key which is said to have come from our possession was in the possession of this young lady on the day upon which she disappeared, in her room on her bureau, and though they may have flashes of light in that room now, and though they may now pretend he saw the hinge of a desk, or a drawer, or whatever it was, and that the sun shining in a particular direction produced a particular result, gentlemen, that will not do. If there is any fact proved in this case, it is proved by one who had no interest to tell what was false, and when no prosecution had been begun, who was telling it upon a memory not three days old, that that key was on that lady's bureau and he saw it with his eyes. Now, if in the face of testimony like that, you will say that that man did not see it, if you will say that Joel's doubtful and hesitating identification is to

be accepted in its stead, you will have departed from every rule that should govern a jury in deciding upon testimony; but I shall never believe that you will so decide. I have no more to say upon the subject of that key, except that it has not been traced to us.

I come now, gentlemen, to one other point with which I shall trouble you. I meant to have called your attention to one circumstance upon the question of motive, which I beg you to consider now, though somewhat out of place. Mark you, gentlemen, (and I beg you to take it along with what has been said to you in reference to the conduct of this young man toward that young girl) it is testified to, and it is one of the most valuable pieces of evidence for us in this case, that Miss Bray was engaged to the accused and that the deceased knew it. Now that engagement had existed for two years or more, and it was known to her. Miss Bray states that in June, 1884, she got a letter from her recognizing that fact. The deceased knew of it by a letter which she had received from her in June, 1884. Now mark you, gentlemen, there has been some suggestion here that, under some promise of marriage or expectation of marriage, the virtue of this young girl was assailed. I only want to ask you to remember that within less than a month of the time at which it is charged this unlawful cohabitation took place between the accused and the deceased, the deceased knew that his heart and his hand belonged to another; and hence there could have been no hope nor expectation on her part which could have allured her into the idea that she might perchance succeed in obtaining his hand. Independent, therefore, of the impossibility of this cohabitation, of its unnaturalness, of the want of opportunity, of his whole conduct, upon which I have already descanted, I beg you to take the fact that within a month of this alleged period Miss Bray had received a letter from the deceased in which she referred to the engagement between the accused and herself. So that that puts an end to any fanciful suggestions upon that subject.

And now, gentlemen, I come to deal with perhaps what ought to have been the first suggestion in this case. It has

been treated by my associates and I deal with it only in general terms. I come to treat of the mode of death of this unhappy deceased. Was she murdered at all? Was not her death by her own hand? Sirs, you know it has been read to you more than once, and I shall not repeat it, that the idea of suicide was present to her mind in any time of great mental anxiety. She seems to have been a girl of strong emotions. Her character in that respect ran somewhat into extremes—joyous and despondent—and when these fits of despondency were upon her, suicide was constantly present to her mind; in her younger days, in her more mature days. This is not matter of conjecture. We have it from her own lips and from her own hand. In 1883 she wrote a letter to Mrs. Tunstall in which she was complaining of the domestic troubles she had to endure. What they were I care not to know. It is enough that she recites that they were so harrowing to her mind that she prayed for death, and that if it were not a sin she would take her life, and invoked that power, upon which all in trouble lean, to strengthen her purpose against this desire of self destruction. That was in 1883. In 1885, coming down upon the railway to the city of Richmond, where something was to be done between herself and some confederate here to relieve her from the condition in which she was, she said to a stranger, a kindly gentleman, the conductor of the train, who was speaking to her because he came from the neighboring county, and like a gentleman was attending to a solitary girl traveling on his train, when he spoke of the speed with which the cars were running, “I wish they would run off the track and kill me.” What did that mean? Why shall you not take these facts along with you when you consider the question whether or not she committed suicide? They are facts that cannot escape your memory and will have their due weight in your deliberation, and they shed a powerful light upon this mysterious transaction. They clear up what is doubtful and dark, and make plain what Dr. Taylor said when these scattered garments were found, one at Dunstan’s, another in the dead house, another near the southeastern corner of the fence of the reservoir enclosure, another

upon the reservoir walk: "It looks like the despairing act of one bent upon self destruction and as a mode of saying 'farewell to my friends and to the world'." It not only disproves the idea of murder by anybody, but can be reconciled only with the idea of suicide, which was her idea in times of trouble. And what does this accomplished gentleman, Dr. Taylor, one of the most accomplished in his profession in the country, and an honor to the state and to science, say, *super visum corporates*, as we say—there on the spot—what was his judgment then and there? Why he said, "My mind inclined to suicide. Every medical or scientific fact I saw was consistent with the idea of suicide." He did not mean to say that it could not be proved to be murder. But has it been proved to be murder? The facts he saw are still unchanged. He knew of these scattered garments. If this accused had been proved to have murdered her, of course Dr. Taylor's theory of suicide was gone. But from what he saw, from the facts presented to his scientific intelligence, suicide was predictable from all that the autopsy disclosed. And Mr. Rose, you have not forgotten, said in reference to this bruise upon the eye, that it might be received by a person jumping in upon that sloping wall and striking it. Dr. Taylor says that that extravasation of blood might have been occasioned by a blow after death, whether by a direct blow or counter-coup, it would only have required more violence, and as this girl threw herself into that reservoir, striking that solid wall with her head, the water not being deep enough to break her fall, there might have been a rupture, after all, of the little blood vessels and this extravasation which he found upon the brain might have been occasioned by that. And, gentlemen, it is considered a physical impossibility that she could have climbed that fence. Sirs, there is one fact in this case to which I call your attention. It has been rung throughout this country that that girl had to climb a fence three feet four inches high to throw herself into that reservoir. It has never been mentioned in print, it has never been said anywhere, until proved in this court house, that within thirty feet of where her body floated was a gate opened by a latch. She had nothing on earth to

do but to pull this latch aside, enter this gate and throw herself into that reservoir, and she may have floated the thirty feet, to where her body was found, or she may have walked along, as you heard did those who got her body out, holding by this fence, in the 18 inches of space, perhaps tearing off this glove that she threw upon the sidewalk and there took her final leave of earth and plunged into the water and was drowned. Sirs, that gate has never been heard of until this case was brought up for trial. And there is the testimony of Mr. Lucas in this case, the man who first touched her body with that pole which is not here. A pole that might very well have made this bruise upon the lip, if not the one upon the brow. The body was taken from this spot and dragged by ropes up to the sidewalk and there it lay, and there is no difficulty, by applying the ordinary rules of reason to the facts of this case, in showing how she might, without climbing that fence at all, which would not have been a difficult feat, have jumped into the reservoir through this gate. Mr. Rose thinks the gate was open in the morning. Why our friend Mr. Rose was in a state of great perturbation of mind that morning. He could not recollect whether he was there when the body was taken out. That body was there in his own reservoir and he could not remember whether he was there when it was taken out or not.

But there are other physical facts about which there can be no dispute to which your attention has been called; but I will trespass upon your time long enough to call your attention again to them, because they are pregnant and powerful facts.

The theory is that this girl was thrown by violence, hurled into this reservoir. How hurled? What rational theory has been presented to you of that? That young man lift that young girl weighing nearly as much as he and throw her over that fence into the reservoir alive! That young man strike her a blow with his fist so hard that his knuckles did not abrade her delicate skin as to render her insensible and then throw her over! Why, sirs, do you not know that he could not have lifted that body, sensible or insensible, to have saved his

life and thrown it over a fence three feet and a half high clean into that reservoir?

What are these speculations and theories? It is said he had a confederate. What confederate? Who saw these prints and tracks of shoes? Much ado has been made about tracks that came up the foot of the embankment from the hole in the fence. Why, who thought about that there, that day? It was never mentioned to Dr. Taylor by the people who had seen them and stood around him and helped to take that body out. Nobody conceived that those were the tracks of the woman in the reservoir there on the spot when the matter was being investigated. Dr. Taylor never heard of them then. Mr. Rose never heard of them then. Dr. Taylor says he saw some signs of tracks there. Doubtless he did. He got out there about eleven o'clock. Mr. Lucas and his four workmen had been there to this very place looking where the body was, and how often Mr. Rose and his associate, Mr. Higgins, had been trampling around there nobody knows. But there were tracks and tracks, and no measurement of tracks; and yet the tracks are to be assumed to be the tracks of the accused.

But I shall trouble you no farther with that branch of this case, which has been discussed so much better by others. But there is one fact, gentlemen, one of those physical facts, about which there can be no mistake. Human testimony may be erroneous, but a physical fact speaks for itself in language intelligible and unmistakable. Now all this theory of a struggle and a contest is put to flight by the single fact that I shall mention, and there is not a sane man who can divest his mind of prejudice who will doubt it. Around that girl's neck was folded a little silk handkerchief, pinned by a little jet brooch, and it stayed there in its natural position, untouched and undisturbed, through all this struggle, through all this hurling into the reservoir and it is consistent only with the fact that she went into that reservoir plunging forward and thus received no shock and that handkerchief retained its place. Until Dr. Taylor unpinned it, that little handkerchief laid there just as she had put it on when last she decked herself. Sirs, you cannot get over such a fact as that. If there was a

struggle, or scuffle, or strife, the very first thing that would have been disarranged, the very first thing that would have been broken would have been this brooch. Her hair was as it was when she made her toilet in the morning. There was no mark upon her dress. There was a little tear upon her jersey, upon the inside of one of these sleeves, which had been greatly enlarged by the washing subsequently, and that was the only place where there was the slightest injury to her dress. There was nothing about her person to indicate a struggle or a strife. Everything about her was natural. And there her dead body lay in the bottom of this reservoir, without a sign or trace of violence upon it, except this blow here which, with all respect for Dr. Taylor and for all doctors, I believe, if it had been violent enough to have made her insensible, and was made by a man's fist, could not have been given without abrading the skin, or breaking it in some form. Yet Dr. Taylor said the skin was untouched, the cuticle was not disturbed. It was only when he washed the mud away from the face that he could see that there was any injury there, and then only by the fact that the skin had risen above the surface; and cutting into it he found the blood vessel below engorged with blood, extravasated, which gave token that some injury had been received upon the surface that disturbed and destroyed those vessels. And that is all. That might be accounted for, and is accounted for, naturally and sensibly and consistently, with the theory of suicide; and I assert it rests at that.

Sirs, if this man is that woman's murderer, then he deserves punishment. But, just in proportion as the crime imputed is atrocious, in the same degree should you require the evidence to be clear and conclusive. There is not a spot in the line of this proof where you can rest your foot with safety as upon a solid basis of fact. There is cloud and doubt and mystery everywhere. And in these cases, upon the subject of identity, I had omitted to call your attention to one case, which I will do now, although, perhaps, not in its regular order.

In a case tried in England, after remarking upon the risk incurred in pronouncing on evidence of identity exposed to

such a doubt, the judge said that when at the bar he had prosecuted a woman for child stealing, tracing her by eleven witnesses buying ribbons and other articles at various places in London, and at last into a coach at Bishopsgate, whose evidence was contradicted by a host of other witnesses, and she was acquitted; and that he had afterwards prosecuted the very woman who really stole the child and traced her by thirteen witnesses. Eleven had sworn to her identity. "These contradictions," said the learned judge, "make one tremble at the consequences of relying on evidence of this nature, unsupported by other proof."

And again, another eminent English judge, Mr. Baron Alderson, upon a trial of this kind, said:

"It was necessary to warn the jury against the danger of being misled by a train of circumstantial evidence. The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, in considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories, and necessary to render them complete."

Now, gentlemen of the jury, I shall leave this case with you, urging you to remember the advice of the wisest and most experienced in the land. Before taking leave of it, you will bear me witness that it is not my practice to flatter a jury, but it is due to you, after these long days and nights of trial, that I should say for myself and my associates, that we render to you our hearty thanks for the patience and kindness and unvaryingly kind demeanor with which you have listened to this case from beginning to end. On our side, we trust it to you in the confident hope that you will weigh the circumstances and the testimony; that you will let this accused go quit of this charge. This unhappy girl has passed to her final account. That God who judges in mercy has no doubt pardoned and forgiven her. It can add nothing to her fate or future to take this man's life without reason and without cause; and I implore you, in the name of that justice which you are sworn to administer, in the name of that oath which

you have taken to make true deliverance between this accused and the Commonwealth, not to add another victim under the idea that has been thrown out to you that he has lived long enough and that vengeance should claim him as her own; but that you will respect his rights and the rights of those who advocate his rights. We have, in our humble and faithful way, stood by him in his hour of trial. Much of censure has fallen upon us because we have ventured to uphold his rights. It is just in such a time of peril, when clouds and darkness gather upon a man, and suspicion overspreads his horizon and prejudice and passion are hunting him down, that he needs the aid of those appointed by the law to see that his just rights are achieved. And, for myself, now at an age when my blood is cold and thin, whatever of life there is in it kindles at the thought that a man shall be hunted to death, and I will defend him to the last, by all the methods the law allows; and in doing that I am rendering you a service and every good citizen a service, the law a service and jurisprudence a service. And we shall deserve and shall receive, when temper has subsided and passion cooled, the plaudits of all whose opinion is worth having, or that we value. It has belonged to my profession, from its foundation, to stand by men of every class and kind in trouble. God grant the day may never come when the poorest or the humblest or the most forsaken shall need a defender! Should such a day ever come, the glory will have gone out of that noble profession.

We give you his case, with the earnest prayer that the God who rules the destinies of us all may guide your judgment in the interests of mercy and of truth.

MR. MEREDITH FOR THE COMMONWEALTH.

Mr. Meredith: Gentlemen—I should not do justice to my own feelings nor to the wishes of the Commonwealth if, before I took a formal leave of you in this case, I should fail to extend to you full and earnest thanks for your conduct and bearing through the length of the trial of this cause. You have borne without murmur the discomforts of this room and above all you have given a patient and intelligent attention to the

evidence developed before you and whatever may be the result of this case the prisoner cannot complain that you have not done as you promised to do—harkened to the evidence. You have listened earnestly and attentively, struggling with questions to arrive at an intelligent conclusion and you have borne yourselves with the earnest desire to see that justice, and justice alone, should be done both to the prisoner and to the Commonwealth. And I venture the assertion that in the kindness of your hearts you have placed upon the shoulders of the Commonwealth a burden that the law did not require she should carry. I venture the assertion that there is not a man on that jury who, when sworn to this cause, did not have in his heart the earnest hope that the young man who stands at the bar, a prisoner charged with the grave crime that is set forth in the indictment, might come forth acquitted. And not only did you enter the box with that feeling, but as the Commonwealth produced her evidence, and as the clouds of guilt gathered and gathered until the storm seemed about to crash him, all through it you never for one moment divested yourself of that humane wish. I do not censure you for it. The Commonwealth would rather carry it as a burden than that she should have her citizens devoid of such noble instincts. But I submit now that the day for such hope has passed and that the hour has come when you shall exercise, not your passions, or your prejudice, or your hopes or your fears, but that you shall stand manfully in the exercise of your judgment upon the evidence in this cause.

The defense has tried to frighten you by a citation of authorities on circumstantial evidence. But, gentlemen, I might cite to you case after case where men have been unjustly hung, not upon circumstantial evidence, but upon direct evidence; case after case where men and women have sworn directly to the observation of crime and it has turned out afterwards that the parties were not guilty. And yet is crime to go unpunished? Is it because men err that men shall not do justice and do the best they can according to their judgment and their consciences? And yet that is the plea. Let me read to you what has been regarded as the best decision that

has ever been delivered upon the question of circumstantial evidence; it has been recognized now for nearly forty years. I read from the opinion of Chief Justice Gibson of Pennsylvania, one of the ablest judges that ever sat on any bench, American or English:

"No witness has been produced who saw the act committed and hence it is urged for the prisoner that the evidence is only circumstantial and consequently entitled to a very inferior degree of credit, if to any credit at all. But that consequence does not necessarily follow. Circumstantial evidence is in the abstract nearly, though perhaps not altogether, as strong as positive evidence—in the concrete it may be infinitely stronger. A fact positively sworn to by a single eye witness of blemished character is not so satisfactorily true as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility."

Let me pause to call your attention to a thing that I suppose has never happened in the annals of criminal jurisprudence. Eighty-five witnesses have been produced by the Commonwealth and the character of not a single one of them for truth and veracity has been attacked legitimately. So you have a case of circumstantial evidence so far as the facts of this case show you, based upon the testimony of a number of witnesses of unblemished character for truth and veracity.

Indeed I scarcely know whether there is such a thing as evidence, purely positive. You see a man discharge a gun at another, you see a flash, you hear the report, you see the man fall a lifeless corpse; and you infer from all these circumstances that there was a ball discharged from the gun which entered his body and caused death, because such is the usual and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air and enter the body of the slain; and your testimony to the fact of killing is therefore only inferential—in other words circumstantial. It is possible that no ball was in the gun; and we infer that there was, only because we cannot account for the death on any other supposition. In cases of death from the concussion of the brain strong doubts have been raised by physicians founded on appearances verified by post-mortem examination,

whether an accommodating apoplexy had not stepped in in the nick of time to prevent the prisoner from killing him, after the skull had been broken into pieces. Now that was in a discussion had in court by able physicians upon positive testimony where the man sees the flash, hears the report and sees the body fall lifeless and yet they tell you about positive testimony. Chief Justice Gibson says he doubts whether there is any such thing:

"I remember to have heard it doubted in this courtroom whether the death of a man whose brains oozed through a hole in his skull was caused by the wound or by the misapplication of the dressing. To some extent, however, the proof of the cause which produced the death rested on circumstantial evidence. The only difference between positive and circumstantial evidence is that the former is more immediate and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. But there is far less opportunity, to my mind, of catching perjury where you have only one or two witnesses to swear positively to a fact, than where you undertake to prove guilt by a long chain of testimony given in by a number of witnesses. A man may as well swear falsely to an absolute knowledge of a fact as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends. No human testimony is superior to doubt. The machinery of criminal justice, like every other human production, is necessarily imperfect, but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam engine."

That is the argument of the learned judge. Does it not strike you as sensible, as practicable, as meeting the every-day needs? Innocent men have doubtless been convicted and executed on circumstantial evidence, but innocent men have sometimes been convicted and executed by what is called positive proof. What then? Such convictions are accidents which must be encountered and the innocent victims of them have perished for the common good as much as soldiers have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief—that is actual and not technical disbelief—for he who is to pass on the question is not at liberty to disbelieve as a juror what he believes as a man. Does not that strike you as right? You hear on the

streets some rumor, some responsible man tells, not under oath and you believe it as a man. If that responsible party, under oath—under the same solemn oath that now binds you to your duty and from which we do not think you will shrink and which would be entirely for you to believe—tells you the same tale under that oath, have you, as a juror, any more right to disbelieve that man as a juror than you have otherwise as a man? Is that sensible, is that practicable? Can the wheels of government go on? Can there be protection of life, liberty and property if you undertake to denounce men as unworthy of belief who have not been proved to be, simply because you find that upon your shoulders rests a sad and solemn and stern duty? You should not shrink from your duty and if you shrink from it, for God's sake do not shrink like cowards and try to place the burden upon the innocent shoulders of witnesses, but like men stand and say, "I fear to do it." Certain cases of circumstantial proofs to be found in the books in which innocent persons were convicted have been pressed on your attention. These, however, are few in number and they occurred in a period of some hundred of years, in a country whose criminal code made a great variety of offences capital. The wonder is there have not been more. They are constantly resorted to in capital trial to frighten juries into a belief that there should be no conviction on merely circumstantial evidence.

The evidence negatives the idea of suicide, viz.: The improbability of a timid woman like Miss Madison seeking such a lonely place as the reservoir grounds at night, the wound on her face, the marks on the embankment, showing a scuffle, the cry of a woman heard by the negro Watkins, the finding of the bundle in the James river, the shawl on the Dunstan fence.

As to the prisoner's visit to Richmond in January, the two principal witnesses, Archer and the colored chambermaid, Henrietta Winbush, have never been contradicted. The theory that somebody else represented the prisoner on the occasion of these visits would not tickle children even. Every description of the man who was here then tallied with the description of the prisoner. Mrs. Dickerson had been allowed by

counsel for the defense to tell that Lillian told her that her Cousin Tommie Cluverius had written to her (Lillian) to come to Richmond on a trip of love to see Mrs. Tunstall who, he said, was not expected to live. She couldn't play this game twice and the Curtis letter was written. When Lillie came back from her visit to Richmond in January she told Mrs. Dickerson that she had met her Cousin Tommie in the city.

None of the Belle Isle witnesses had any prejudice against the prisoner. Several of these witnesses went down to the jail and without trouble pointed out the man. All picked out the same man. Wasn't this wonderful?

Was there ever a case of stronger circumstantial evidence? And, mark you, gentlemen, this is the man that has been proved to have seduced the poor dead Lillian; seven men had picked him out to whom the note was addressed and none of them had ever seen him but once before. If there had been any confederate in this city would it not have been probable that he would have turned up in Richmond on the 13th of March and would he not have been the man she would first have seen? Here were absolute facts: seven men identifying a man to whom a note had been addressed in the morning by the dead woman. She was last seen at Belle Isle a little after 12:30 o'clock and old man Dodson says she was back at the American Hotel some time after 1 o'clock. She had plenty of time to reach the hotel at that time. It was natural that the prisoner let her go to the hotel to get her dinner because he didn't want to be seen with her in a restaurant. At 2 o'clock she was with him at a brothel. Joseph Dodson had seen her in the dining room eating dinner with her hat on and Diggs, the head-waiter, had also testified to seeing her. We have shown that the prisoner at the bar was the man the deceased came from Bath to visit. Now if he was the man identified as being at Belle Isle with a woman why did he not produce the woman? Isaacs, one of the Belle Isle witnesses, had identified the woman at the Alms House as the woman he had seen at Belle Isle with the accused. The testimony of Mr. James shows that he saw Cluverius and Miss Madison near the American Hotel and his identification of the deceased from a

photograph of her shows beyond doubt that the accused and the deceased were together about mid-day in the city of Richmond, near the American Hotel on the 13th of March, Tuesday night after the tragedy the witness Tyler testified before the coroner what passed between the deceased and a young man who called on her at the hotel. The words that Tyler repeated were found in the Curtis letters and were only known to the writer and Mrs. Dickerson up in Bath county. How did Tyler find out this? Yet he repeated what had been agreed upon in these letters. Didn't this back Tyler up?

After the deed was done the horror of his crime came to him and he grasped all the articles of clothing that he could find and fled from the spot. In hastening through the hole in the fence his watch key is torn from him and trying to put the veil and gloves in his overcoat pocket the articles are dropped. The hat was thrown into the dead house and as the murderer fled from the lifeless body in the waters of the reservoir he came to light first near Dunstan's house, near the corner of Carey street and there he threw the red shawl on the fence. The finding of the key was conclusive evidence that the prisoner was at the reservoir that night. It was strange that the key happened to wind up the watch of the prisoner. At the time the key was given to Wren the name of Cluverius had never been mentioned. It would have been a risky business if Wren had undertaken to put a key there that would have fitted the watch of a man he had never heard of; it would have been almost equal to making things come to pass. Mrs. Dickerson had never seen Lillian wear a key like the one found at the reservoir. Mr. Joel's testimony showed that the key found in the reservoir enclosure was the property of the prisoner, Joel having repaired it for him. Joel was a cautious witness as was shown by the record of his testimony. He shrank from appearing as a witness and his testimony was almost conclusive and positive. The law was plain that the conduct of the prisoner must be taken as a circumstance of guilt. The prisoner, when the officers of the law came with a warrant charging him with murder, replied that it was ridiculous and invited them into supper with him. A man who

had murdered a woman and child was just the sort of a man that would exhibit the sort of pluck that the prisoner at the bar had shown here day after day. He did not even ask who had been murdered and it was evident that he was prepared for the arrest. He knew it was Lillie Madison and he did not want to hear her lips charge him with her murder. He was cool. There was no fear or trembling and no indignation or exclamation of surprise but only the remark, "Why, Lillian committed suicide."

Then the removal of the piece of watch chain was an attempt to conceal proof of his guilt. That confirmed Joel's statement that the key was the key of the prisoner. I say, gentlemen, if all the opportunity has been given to the prisoner, if he has had able counsel, if he has had ample opportunity to make his defense, if he is given every opportunity by the Commonwealth to make such defense as he saw fit and yet the evidence in the case points to the prisoner as to the time, the place, the opportunity, the means, the conduct, and the motive, you must not shrink, you must not hesitate, whatever may be the sympathies of your heart or the kind feelings that you may have for the young man or for his aged relatives; but you must remember that mercy shown to such a man, if he be guilty, is not mercy.

Mercy shown to the criminal in that way but encourages crime. Justice—even-handed justice—dealt out upon the facts and upon the evidence is the highest degree of mercy that you can show. And if you doubt that the prisoner is guilty, if you have a reasonable doubt, I ask you in the name of the Commonwealth to give it to him. But I do say that if you look over this evidence you can have no such doubt; and I do insist that you will not be led by any fears as to the effect of circumstantial evidence, by any thought that a fear or an anxiety is a reasonable doubt; for it must be such a doubt as you would not hesitate to stand up before sensible men and say, "Why, this is the reason." When you take the whole case as it stands and view it from beginning to end there is nobody that it points to; there is nobody suspected, there is nobody in the case as to whom any degree of suspicion can

be aroused except the prisoner and every circumstance laid down for your guidance in the book points clearly and directly to the prisoner. That being the case, however hard may be the taking of a human life, however much you may shrink from so solemn a duty, yet, as you have assumed the burden, I shall ask that as men you will bear it nobly to the end; and I ask that you do justice to both parties.

THE VERDICT AND SENTENCE.

June 4.

The Jury retired and after an absence of two hours returned into court with a verdict of guilty of murder in the first degree, as charged in the indictment.^a

^aAfter the verdict the *Richmond Dispatch* printed an interview with Juror Harrison in which he said: I was talking with Mr. Pollard felicitating him upon his noble effort in behalf of his client when Judge Crump joined us and addressing his remarks to me said (I repeat his remarks verbatim as nearly as I can recall them), "You know I have seen but little of you since your boyhood and it is my recollection that you could not then be easily intimidated." I retorted, "Well, no, not exactly. I think, sir, that if an effort had been made in that direction, the combative spirit of my disposition, which is slightly developed would have induced me to revolt. I might have been tempted to act contrary to my honest convictions for a time at least, simply to demonstrate my utter and supreme contempt for public opinion as voiced by the lawless rabble who on one day would lynch an accused without a shadow of evidence of guilt and on another strew a convicted felon's path with garlands."

Judge Crump, continuing, said, "Did you or any of your associates receive any communication whatever during the progress of the trial?" I replied, "No, sir, none whatever unless it came through the hands of Judge Atkins." "Did you hear any noise or disturbance outside the jury-room after your retirement from the court the last night of the trial?" "No, sir, if there was any noise I did not hear it. I had quite enough inside to occupy my whole time and attention. Our verdict was soon arrived at; indeed, we had come to a decided determination before even the argument commenced." Judge Crump: "Oh, even before the argument?" "Yes, sir, I am very sure that at least ten of my associates had expressed themselves immediately after the close of the evidence for the defense. I was convinced of the prisoner's guilt, but refrained from any decided expression until the morning of the last day of the trial." Some questions were then asked in reference to intimidation in general and more particularly to a remark made by a physician when passing the jury on Broad Street. I told Judge Crump that while I heard

June 5-16.

On June 5 the *Prisoner's Counsel* moved that the verdict be set aside and a new trial ordered, which was denied by The COURT on June 8. Whereupon a motion in arrest of judgment was made which was overruled on June 16.

June 19.

The COURT asked the prisoner if he had or knew any reason why it should not proceed to pronounce the sentence of death upon him according to law.

the remark, which was in substance: "Remember the Cincinnati jury and the Cincinnati riots." I paid no further attention to the matter other than to remark that the gentleman's conduct was in extremely bad taste. I have known the gentleman referred to for years, and from my personal knowledge of his character I can say that I believe the remark was made purely in jest. It certainly had no effect upon me or as far as I am able to state, upon any of my colleagues. This is the whole affair in a nutshell. You see it is as our old friend Aesop would say: A mountain in labor, a mouse is the outcome.

As to a remark I made about not commiserating the fate of Lillian Madison, which has been published, what did I mean? Oh, well, I meant substantially what I said. You know that we jurors heard a good deal that could not from the very nature of the case be made public, but apart from this I have no sympathy for a woman acting as a free agent, yielding to temptation with the inevitable and dire results staring her in the face. I have never been in love, nor have I had any woman to love me. I believe I am a predestined old bachelor. Therefore I cannot as a matter of course appreciate fully the degree of influence which can be exerted. I am not at all anxious to have an opportunity of experimenting. I was the only bachelor on the jury.

You must allow me to say one thing in conclusion. The occasion offers and I feel it my duty to award to Sergeant Lee and his efficient deputies the highest meed of praise for the utmost diligence, circumspection, courtesy and successful guard of the jury during the entire trial. They obeyed not only the spirit but the very letter of the *lex scripta*. So far from the slightest intimation of the state of public opinion coming to us, our seclusion was absolutely cloistral and if we thought about public opinion at all, I feel confident in positively asserting that our idea was that the invariable and inevitable reaction had begun, predicating our opinion solely upon the conduct of persons who noticed us in our semi-occasional preambulations. How did the demeanor of the prisoner impress the jury? Well, as far as I am able to judge it did not impress them one way or the other. We were not trying him on his demeanor. We did not profess to be psychological or metaphysical experts.

Cluverius: I would say, sir, that you will pronounce sentence upon an innocent man. That is all I have to say, sir.

JUDGE ATKINS: Twelve of your fellowmen selected for their intelligence and impartiality have patiently and attentively listened to the evidence in this cause. Witness after witness has been examined and day after day been consumed in an endeavor to arrive at the truth, the whole truth and nothing but the truth of this charge. Exceedingly able counsel have done all that learning, eloquence, skill and experience could accomplish in your behalf; you have had a fair and I may say a liberal trial, and finally the jury in the faithful discharge of their duty have pronounced you guilty and that verdict has been approved by the court.

Thomas J. Cluverius, you have been indicted for the willful, deliberate and premeditated murder of Fannie Lillian Madison, your companion and cousin, whose confidence you had betrayed and treacherously seduced. I shall not harrow your feelings by referring at length to the enormity of your crime, every step in the perpetration of which must be engraved upon your memory. To a man of your intelligence no good could be accomplished by doing so. I commend you to the suggestions of your own better thoughts. Nor is it necessary to comment upon it in the interest of society. I do not deem it my duty therefore to do more than to pronounce upon you the sentence which the law affixes to the crime of murder of which you stand convicted.

It is ordered that the sergeant of this city cause execution of this sentence to be done upon the said Thomas J. Cluverius by hanging him by the neck until he be dead, on Friday, the 20th day of November, 1885, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon of that day, at some convenient place, at or near the city jail, and only in the presence of such officers of the law as may be necessary to see that the sentence of the court is properly carried into effect. And may God of His Infinite Goodness have mercy on your soul.^b

^b In the story of his "Life, Trial and Conviction," (ante p. 385) Cluverius gives the following account of his movements in Richmond on the day and night of the murder. (It was not possible for

An appeal was taken to the Supreme Court, the principal objections being technical ones, viz.: That the Hustings Court had no jurisdiction of the case, as the regular term had expired when the trial began; that the court below should not have excluded Larke and Goode (ante p. 387) from the jury; that the judge had erred in his method of impaneling the jurors; had allowed irrelevant evidence, particularly the "torn note" and the "Curtis" letter to be considered by the jury.

But finally the real issue was raised, viz.: Did the evidence support the verdict that Cluverius had murdered Lillian Madison?

The Supreme Court promptly disposed of the technical points, deciding them all in favor of the Commonwealth. And on the question of proof, Chief Justice Fauntleroy in an exhaustive opinion reviewed all the evidence on the trial and declared all his colleagues, but one, concurring that the prisoner was guilty and that "justice to the prisoner and mercy to all the innocent public alike demand that he shall now pay the penalty of his crime and answering with his life for his foul deed, live not to act another."

him to get this to the jury, as in Virginia at that day a prisoner was not permitted to testify on his trial.)

"I left the Davis House about nine o'clock in the morning and went on Main street; saw Mr. H. R. Pollard and after about five or ten minutes talk with him I went to Morgenstern's on Broad street between Fourth and Fifth street to get breakfast; came back to Ninth and Bank streets a little after 10 o'clock and went to the bankrupt court office; met a gentleman I did not know who told me that the clerk was not in. I went then up to the State Library as the most convenient place to get a city directory to try if I could find the addresses of two gentlemen (William Wood and R. W. Walker) who had an interest in a tract of land in my county that a Mr. Bray wanted to buy, he thinking that they lived there. Coming out on the steps of the Capitol I got in a casual conversation with one of the guards who told me of Governor Cameron's losing a horse a short time before, etc. This about eleven o'clock. Went from there to Grigg's shoe store on Main and Eighth streets to get a pair of shoes for my aunt; carried the shoes to my room at the Davis House; got there about eleven-thirty; went to my room, put the shoes in my satchel; afterward, came to reading room, stayed there a while, wrote a check on the Planters' National Bank for \$2 (the amount of the bill at the Davis House); left about twelve o'clock, went to the bank and got the money; went from there to the bankrupt court again; this time saw the porter, who told me that the clerk was sick, that he had the office key but he knew nothing about the papers. I then went to the money order department in the post office (about 12:15 or 12:30) to see if I could get a money order to Aylett's, Virginia. Had to wait for two persons before me to get through, then examined the books and found Aylett's was not a money order office. As I was leaving the office (between 12:30 and 1 o'clock) I met and spoke to Mr. B. W. Henley. I went

After this, petitions were presented to the Governor of the State for the commutation of his sentence. But the Governor refused to interfere. From the day of the verdict to that of his execution the prisoner maintained his innocence and refused to make a confession of his guilt. Rev. William E. Hatcher, who was his spiritual adviser during his imprisonment, says: "At first I had a prepondering suspicion of his guilt and watched him closely, but I gradually found myself drifting

from there to Lumsden's and Sons, jewelers, between Eighth and Ninth streets on Main street to call for a breast-pin I brought over for Mrs. J. E. Bland and left there to have fixed. Coming back I met a college-mate, M. B. Harrison, about 1 o'clock, near the corner of Eleventh and Main street. Went together into Schoen's (corner Eleventh and Main); had a glass of mineral water and a smoke; stayed there nearly half an hour, or about, talking over college days, etc. Parting there, I went to a restaurant next to the Despatch office; there I met a Mr. Lipscomb, of King County, with Dr. Whiting of West Point. There I got dinner; left there between 1:30 and 2 o'clock; went to Dime Museum where I saw Mr. T. B. Bagby. Left there about 5 or 5:30 at the close of the performance; went up on Seventh street above Broad to a barber shop (used to be Oliver & Robinson's) got a shave. Coming back, bought a copy *The State* on the street; came to Davis House; went in the reading room; read that, also New York papers there. Went to my room, brushed my hair, etc. Came down, got supper and left there about eight o'clock. Went up to Ford's Hotel to see if Mr. Pollard was there. I wanted to see him as he was looking after the same papers in the bankrupt court that I was. He was not stopping there. I went to the St. Claire Hotel to find him, knowing that he had stopped at both these hotels while in the Legislature. Not finding him, I went around to the Dime Museum; got there after the performance had commenced and stayed until the close, and as he was passing out in the crowd, saw Mr. Bernard Henley with another young man. I spoke to Mr. Henley, but did not shake hands, my attention being drawn just then to the falling of a little child in the crowd. I went from there to Morgenstern's; had fried oysters, etc.; also a box of fried oysters fixed up for lunch next morning. Came back to Davis House between 11:30 and 12 o'clock; ate an apple with Mr. Davis, paid my bill and went to bed. Was called after 5 the next morning, left the hotel for the depot about 6 o'clock; there met with Captain A. Bagby, Dr. Whiting and others, and left the city with them about 7 o'clock.

"This a statement of my movements during the day and the night of the 13th of March, 1885, with the people I saw. I am willing to stand on it in time and eternity, for believing that at some day, be it early or be it late, I must stand before the judgment throne of Almighty God, I can say that my hands are clean and my conscience clear."

to the conviction that he was not a murderer. He made no confession to me, though I urged him often to tell me the truth. His family also wrote him that if he was guilty in whole or in part, they wished him to confess it. But to this he replied that he was not guilty of the crime for which he was condemned to die."

THE EXECUTION.

Friday, January 14, 1887.

This morning great crowds assembled on the hills and house-tops and on the trees and telegraph poles surrounding the Richmond jail. The prisoner not more than fifteen minutes before he was led to the scaffold was informed by one of his counsel that the Governor had refused a reprieve. He replied, "It is bad and I am sorry for myself, but far more for others whose hearts will be broken by the result." When the death warrant was read he was asked by an officer if he had anything to say. "No," was his answer, "I do not wish to say anything." Dr. Hatcher then prayed and then Cluverius whispered a message which he wished him to give from the scaffold, adding: "Good-bye, Doctor, please try to comfort them at home and give them my love." He walked to his death without faltering and took his place on the platform without a tremor. He had previously told his friends that he would make no speech, that he had told his story in his book and that he would not gratify the greed for sensation in the crowd that would naturally assemble on such an occasion. Dr. Hatcher made the announcement he had requested, which was: "Tell them for me that I come to my death without one hard feeling in my heart toward any one in the world."

In the *Richmond Dispatch* there appeared the following, under the caption, *Cluverius Hanged*:

"Near about 1 p. m. A May day in winter. A jail in a bottom. Several hills around it. Nearly all the prisoners are locked in their cells and the yards and corridors are packed with well dressed strangers, all men, no women. A room door on the upper floor opens and out comes a young man, marked of all men present. On his head is a drab-colored slouch hat; over his shoulders a waterproof cir-

cular. He walks by the side of an officer but requires no assistance. His eyes are downcast, his face is white but the native ruddiness of health is gone and in its place is already set the indescribable hue of death. He comes out on a platform from which he is seen by thousands standing on the street or perched on house- or hill-tops. There is a murmur of recognition, a wave of unsympathetic sound. Down a long flight of steps he goes and walks without assistance. Then he crosses a little yard, then enters a gateway. Before him is a walled space, 15x120. Here hundreds of people are jammed and in the end is a gallows, its new pine boards glistening in the sunlight. The multitude parts, then closes behind the young man. He reaches the gallows, and ascends it. Many avert their eyes.

"From the passage-way opposite the door of the room but lately occupied by the prisoner a reporter stands and looks down into the crowded yard. He sees all the men take off their hats and bow their heads. A prayer is being said. A breath of fresh air blowing through the vacated room brings with it the perfume of growing geraniums. There is the subdued wail of a woman. 'Only a prisoner,' says a bystander. Mr. Dunn who has been the day watchman at that door for months, backs into the corner of the passage and will not look down. A prisoner who is suffering from heart disease comes up to him and expresses fear that the excitement will kill him. On go the men's hats in the yard below. Then there is a flutter of excitement and many men move and twist uneasily. A dull thud breaks the deadly silence. All know what it is and all faces are blanched. Then scores rush for the outer yard, away from the body swinging in the air. Men descend from their perches; the crowd about the jail breaks. There is a rush from the inside to the outside. After an interval a dead body is removed; workmen commence to remove the scaffold and the jail and all its people settle to the routine of daily life."

THE TRIAL OF MARTHA BRADSTREET FOR LIBEL, NEW YORK CITY 1817,

THE NARRATIVE

A woman in New York City who was separated from a rather worthless husband, finding that he was about to take proceedings to get hold of some of her property, brought a suit for divorce against him and obtained a decree. Finding out later that the husband had bribed an old soldier to give false testimony against her on the trial and being told that his attorneys had charged her with improper conduct, she published in a New York newspaper a letter charging the lawyers with having knowledge of this bribery and with taking the case expecting to get their fees out of her estate, which was large. The lawyers, who were members of the bar of high standing, proved very clearly on the trial of the woman for libel, that they knew nothing of the husband's attempt to bribe and that they had conducted the suit in a proper way. The jury acquitted the woman, for the Judge instructed them that in a prosecution for libel (unlike a civil action for damages), the fact that the charge was false was not controlling, but if they believed that she had good and reasonable grounds for believing that what she published was true, she was not guilty.

THE TRIAL.¹

In the Court of General Sessions, New York City, 1817.

HON. JACOB RADCLIFF,² *Mayor.*

December 1.

In July last the defendant, Martha Bradstreet, formerly the wife of Matthew Codd, was indicted for writing, publishing and delivering to William Coleman, editor, a certain libel of and concerning George Wilson, Peter Wilson, Jr., and Charles Baldwin. She pleaded not guilty.

¹ New York City Hall Recorder, See: 1 Am. St. Tr. 61.

² See: 1 Am. St. Tr. 61.

Hugh Maxwell,³ *Mr. Gardenier* and *W. M. Price*⁴ for the People; *Thomas A. Emmet*,⁵ and *James W. Wilkin*⁶ for the Defendant.

Mr. Maxwell: The prosecution is for writing and publishing a false and malicious libel concerning George Wilson, Peter Wilson, Jr., and Charles Baldwin, solicitors and counsellors in the Court of Chancery, and the latter is also a Master in Chancery. The alleged libel with the introductory matter I will now read to the Jury.

New York, June 18, 1817.

To the Editor of the New York Evening Post.

Sir:

I request the favour of your giving the enclosed letters insertion in your next paper.

The circumstances which have given rise to its necessity, are of a nature too important for an injured party to adopt a less public mode of communication.

My having affixed my signature at the close of the letter addressed to the Messrs. Wilsons, will satisfy you, I trust, that I shall readily meet any legal investigation of its contents, which they may think it prudent to resort to.

I am well aware, that from those whose interest or inclination it may suit, I stand exposed to the leaden shafts of illiberal remark for this novel attempt at female vindication, or rather infliction of a just vengeance on persons who have essayed all their malicious powers to embitter the future hours of my life, by depriving my children of every hope of future respectability, by the destruction of their mother's reputation.

You are to consider yourself at liberty to publish this letter, with those which accompany it, if you think proper:

And I am, sir, your obedient servant,

Martha Bradstreet,
Formerly Martha Codd.

To the Public.

In consequence of his intemperance and ill-treatment, I was compelled, in the year 1809, to separate from my husband, Mr. Matthew Codd: from that period until the year 1816, he resided in the southern states; myself in the state of New York, where I have endeavoured to fulfil my duty as a mother, in the maintenance and education of his five children, and in prosecuting claims to a valuable property, which I am led to suppose are just.

A prospect of success in this latter pursuit of mine, prompted him

³ See: 1 Am. St. Tr. 62.

⁴ See: 5 Am. St. Tr. 360.

⁵ See: 1 Am. St. Tr. 63.

⁶ See: 1 Am. St. Tr. 62.

to return, with a determination to assert a *fancied* right to a life estate in any property I might recover. For this purpose he applied to several civilians in this city, who, on inquiring into the character of the respective parties, declined engaging in his cause. Under these circumstances, he became the client of Mr. George Wilson, and I was compelled to resort to the court of chancery, to obtain a divorce; a measure I had hitherto declined, although strongly urged to it by the advice of my friends.

A bill was accordingly filed in the court of chancery, on the 31st day of May, 1816, and the usual time for the defendant to answer having elapsed, an order was obtained to take it *pro confesso*, as the lawyers call it. Witnesses were examined before the master, John G. Bogert, Esq. and his report made up as to the criminality of the defendant; but upon an affidavit sworn by George Wilson, stating, among other matter, that the default had been owing to his own indisposition and "incapacity to understand his client's ideas," his honour, the Chancellor, was pleased to grant the usual indulgence, and the defendant was permitted to answer.

At the expiration of nine weeks, an answer was filed. Upon application of my counsel for a feigned issue, it was opposed, on the ground that the material charge in the bill was not sufficiently specific, the defendant having previously sworn in his answer in utter denial of every such charge, and the oath having been received by Mr. Peter Wilson, as master in chancery!—His honour, the Chancellor, was pleased to direct, that my bill should be amended in that particular, by making the material charge more specific, which was accordingly done, when lo! his counsel thought it expedient to demur, as it is called, to the bill altogether; that is, to admit the facts. I make no remarks on this, but leave it to be disposed of by the gentlemen of the profession.

At length, however, the Chancellor decided the point without an argument. A feigned issue was again applied for by my counsel and obtained, which was accordingly tried before his honour Judge Spencer, at the City Hall of this city, on the 23d of April last, whose certificate of the result will speak for itself.

On this occasion a singular circumstance occurred: Isaac Sherman, formerly a soldier in the United States' army, belonging to the company of Captain Arthur P. Haines, first regiment United States' light dragoons, was called as a witness for the defendant by one of his counsel, Mr. Baldwin, who did him the justice to introduce him as a man who "had lost his health, and the use of his speech, by wounds received, and hardships encountered in the service of his country, and as being the man who had taken General Proctor's horse;" when, to the great discomposure of that gentleman, who had so introduced him, this gallant soldier proved himself as *honest* as he was *brave*, by disclosing, in open court, a most nefarious conspiracy; stating, under oath, that an offer had been made to him by the client of Messrs. Baldwin and Wilsons of "a Thousand Dollars, on condition that he would swear to certain perjuries, for the purpose of invalidating the testimony of my material witness,

and totally ruining my reputation," which statement he corroborated by producing a paper in the handwriting of the defendant, containing instructions upon which he was to shape his testimony, and which was identified by Thomas Addis Emmet, Esq., one of my witnesses. The consequences may easily be imagined, both upon the court and jury, and the counsel opposed to me. I think it but justice to declare, that until the evening previous to the eventful trial before Judge Spencer, when after much difficulty of search he had found me for the purpose of disclosing his knowledge of the plot, I never saw or heard of Isaac Sherman; but, in consequence of certain insinuations to the contrary, which, I understand, some of the opposite counsel continue to circulate, even since I have obtained my decree of divorce, and notwithstanding their client fled from the court, and absconded as soon as he was apprized of the nature of Sherman's testimony, which he gave when he happened to be out of court, I shall take public and effectual measures to substantiate this declaration, perfectly aware that I hereby offer them an opportunity to refute this charge, if untrue.

Martha Bradstreet,
Formerly Martha Codd.

Greenwich, March 20, 1817.

A reconsideration of the advice of friends, and incidents which have occurred since the decree pronounced by his honour the Chancellor, have led me to lay before the public, documents which will tend to elucidate the nature of the circumstances which have given rise to the following correspondence: In the course of which, if indignation has led me into an appearance of acrimony, to the public I plead, in extenuation of it, the dreadful necessity to which I am driven to defeat the secret machinations of disappointed avarice, which have already, in various ways, attempted to injure the reputation of

Martha Bradstreet,
Formerly Martha Codd.

Greenwich, June 17, 1817.

SUPREME COURT.

*Martha Codd, Plaintiff, vs.
Matthew Codd, Defendant.*

Feigned issue directed by the Court of Chancery of this State, by its order, dated the 28th day of February, 1817—tried on the 23d day of April, 1817, before his honour Judge Spencer, when the charge of Adultery was so fully established and proved, that the judge recapitulated the testimony, which the plaintiff's counsel had previously consented to submit to the jury, without remark; and the jury without leaving their seats found a verdict for the *plaintiff*; on which Judge Spencer has given the following certificate:

"I, Ambrose Spencer, one of the justices of the supreme court of judicature of the people of the State of New York, and the judge before whom the issue above mentioned was tried, do certify, that no evidence of the confession of the defendant was received on trial

of the said issue in maintenance thereof, and that the verdict in this cause was supported by proof without the confession of the party charged; and further, that the said verdict was satisfactory to me.
(Signed) Ambrose Spencer.

Dated Albany, the 27th day of May, 1817."

Greenwich, June 16th, 1817.

To Messrs. George Wilson and Peter Wilson, Attorneys at Law, and Masters in Chancery.

Sirs:

The irreparable injuries you contemplated effecting to my reputation, and the future welfare of my children, demand this public exposure of some of the insidious means you have resorted to for that purpose: I do not offer this remark otherwise than as an extenuation of my intrusion on the notice of the public, through the medium of the press.

Independent of frequent slanderous and malicious remarks on me, (a person at that time utterly unknown to you) you have frequently so far forgot what was due to the character of the civilian, and the man, as to make me the subject of abusive invective in places of public resort; sheltering yourselves, no doubt, in your professional knowledge, that a married woman could not sustain a civil action for slander.—Be it so; but be assured, that the fancied security you hold, does not exempt you, on this occasion, from the contempt and censure of every gentleman of every profession; nor shall the acknowledged respectability of your father, or the high esteem and respect I am proud to own towards another near connexion of yours, restrain my maternal indignation from placing your conduct in its true light, before that public, from a jury of whom I have so lately obtained justice, notwithstanding your efforts as the champions of wrong.

In your idle, ignorant, and unprincipled associates, you have, no doubt, selected very proper channels for circulating slander and falsehood. Be it now my part, as the injured woman and the mother, to develope some share of them, under the sanction of such authority as you dare not contradict; and you shall prove my candour and temerity keep pace with each other. You fancied, no doubt, that to embellish the history of the hero of a very bad tale, might serve to dazzle the judgment, or enlist the passions, even of twelve honest jurors; at least, that it was worth while to try; and as you, Mr. George Wilson, profess yourself "to have a Head," you took unwearied pains to introduce an unfortunate client, whom your artifices had misguided, and upon whose depravity your avarice has set the seal, as a man who had "done the state some service."

At the Tammany Hall, and in other places, you have ventured boldly to announce, that in consequence of his valorous achievements at the memorable battle of New Orleans, under General Andrew Jackson, he was made a Colonel on the field.—Now, for the better information of that part of the public who may have been beguiled by this unprofitable fruit of Mr. George Wilson's "Head," I shall

subjoin a correspondence⁷ growing out of this fabrication, a fabrication which, however silly in appearance, was intended to aid other malicious schemes against me and my children; and I shall then leave you to the judgment of the public, which, however silently it falls, often leaves a deeper trace than more noisy torrents.

I take, however, this opportunity of informing those whom it may concern, from unquestionable testimony, that you, Mr. George Wilson, have declared, that the reason you withdrew the exercise of your talents on the trial before his honour Judge Spencer, on the 23d of April last, and substituted those of Mr. William Price, was, that you had discovered the villany of your client: and here, however immaterial the remark may be to Mr. Price, I cannot allow this opportunity to pass, without declaring, that I appreciate the honourable and gentlemanly manner in which he abandoned a cause he had been deluded into by misrepresentation, I will do your sagacity, sir, more justice in avowing the belief, that your real motive was, that you had just then learned, from undoubted authority, that barriers existed of an insurmountable nature, to prevent the execution of certain deeds of conveyance, intimately connected with your client's success in defeating my efforts for the preservation of my life, my reputation, and the welfare of my children.

For the fee he received, Mr. Charles Baldwin, I am informed, did all he could for your client, extending it to the forfeiture of the character of the gentleman in his address to the jury; for I am told, that a more indecent attempt at eloquence, in a bad cause, has not often insulted a court of justice. I understand you, Messrs. Wilsons, now complain, that your client has involved you in debt. I confess I am too candid, did I even believe your assertion, to affect to sympathize with you; but of this be assured, that there is a debt which he will amply pay you yet, in his dying execration, for having led him on to the total ruin of the last remnant of his reputation. I think it proper here to remind Mr. George Wilson, that his most material witness, Isaac Sherman, ("the soldier who took General Proctor's horse,") was well known to you some time before he gave public proof of incorruptible honesty, and that in your office in Nassau street, frequent consultations took place between your client and Sherman, with your privity and consent. On this subject, the rest is left to the reader!!!

I will also refresh your memory, Mr. George Wilson, by reminding

⁷ The correspondence here referred to, and which followed in the Evening Post immediately after the matter alleged as a libel, consists of a letter from John Bradstreet to General Jackson, bearing date May 3d, 1817, inquiring whether Matthew Codd was by the General made a Colonel on the field, "for his valorous exploits," in the engagement at New Orleans? The reply of the General to this inquiry, bearing date at Nashville, the 26th of May, 1817, alleges, that he was not acquainted with any man by the name of Matthew Codd, during the war; nor with any circumstance, which occurred in the engagement, of the kind alluded to in the letter of Bradstreet.

you, that the gentleman who has addressed General Jackson in the following letter, (the answer to which he only received on the 14th inst. and which is now submitted to the public,) is the same respecting whom you publicly observed, "that if you were in your client's place, you would shoot that Bradstreet." In addition to other vile and unfounded remarks, this was intended to publish your opinion of my criminality. I and my family have to rejoice in common with Mr. Bradstreet's wife and children, that however low you had prostrated your client's principles, he was not so easily prompted to murder as to perjury, and that I, notwithstanding detraction and persecution,

Am always myself,

Martha Bradstreet,
Formerly Martha Codd.

Mr. Maxwell: The innuendo was that the defendant meant thereby to insinuate and be understood that George Wilson had conspired with Matthew Codd wickedly to instigate and persuade the said Isaac Sherman to swear to these perjuries for the purpose of invalidating the material witness of Martha Codd and ruining her reputation.

Under the matter in the communication to the Messrs. Wilsons that "*he was not so easily prompted to murder as to perjury,*" the meaning, as alleged in the innuendo was that defendant insinuated that George Wilson had prompted Matthew Codd to commit murder and perjury; and also that George Wilson had prompted him to induce and persuade Isaac Sherman to swear to the perjuries.

Mr. Wilkins opened the defence by stating the various circumstances on which the defendant relied.

THE EVIDENCE FOR THE DEFENSE.

Isaac Sherman: In April became acquainted with Matthew Codd, then called Colonel Codd. At the solicitation of Codd went with him to the office of Wilson & Gale where Codd asked me to go to Eastchester and to be in readiness at the office at a certain hour. The same day met Dr. Jacob S. Arden and Codd in one chair and Charles West in another, proceeding up the Bowery, and got in the carriage with West.

Five miles beyond Haerlem Codd complained that his horse was weary and proposed to Arden that he should leave his chair

and get in that of West and that I should get in the chair with him to lighten the load. Codd then, disclosed to me that I should go the next morning to Mrs. Cannon's and try to pump out of her what I could, and what I could not Codd would supply, offering to give me \$1000 and if the cause was gained, more money.

We put up that night at the widow Husted's, about nineteen miles from New York. I received money for my night's reckoning and proceeded behind and came to Husted's Inn as a traveling man who wanted employ. In the

evening Codd gave me written directions where to find Mrs. Cannon's and the next morning I proceeded before and they followed behind. After travelling better than a mile arrived at Cannon's; found Mrs. Cannon and her husband, the former being sick, sitting in the corner with an infant. I asked for employ and Cannon recommended me to a Mr. Monroe. Shortly afterwards Codd, West and Arden arrived, and West read a subpoena to Mrs. Cannon, who stated that she was unwell and could not go. She ordered Codd to leave the house or she would have him put in the State Prison. They pretended not to know me.

After some further altercation they all left the house and lingering behind the rest, Arden called to me: "Ha, you man with a blue jacket, can you give me a chew of tobacco?" When I came up to Arden he said: "You know I don't use tobacco, but I wanted to tell you to follow us." We then went to the house of a Mr. Armstrong where Codd gave me fourteen shillings for stage fare to New York and a further sum for other expenses. Was there directed to stay in the neighborhood that and the following day and to watch an opportunity when Cannon should be absent and try to find out what I could from his wife. Was then to return to New York in the stage. I asked Codd how he was to pay his lawyer and the answer was that he had secured him with property.

I assented to the proposal of staying and performing what was directed and Codd and his companions departed. Shortly after this instead of returning to Mrs.

Cannon's I set out for New York and was taken by a wagoner to whom I gave a dollar for my fare to the city. According to appointment went to Wilson's office and found Codd. Codd handed me a set of instructions in writing concerning what I was to swear in court and directed me to learn it by heart. There were frequent secret conferences between Codd and me relating to this affair in the back office of Wilson; sometimes when Wilson was in the front office and sometimes when he was absent. Sometimes Codd would ask permission of Wilson to let him go in the back office, who delivered him the key. All the communications I ever received on the subject except as before stated, received from Codd at his office. Wilson was not present at any such conference, not did I know that he had any knowledge of the nature of any such communication. Codd advised me to keep the expedition to Eastchester a profound secret.

A few days before the trial George Wilson inquired if I was to be a witness. Answered in the affirmative, which was the only communication on the subject I ever had with Wilson. Codd gave me another set of instructions before the trial. Came in Court and being requested by Mr. Baldwin, the counsel of Codd, to state what I knew relating to the case, said: "All I know is that Colonel Codd has offered me \$1000 to swear to a lie." Mr. Baldwin said: "Mr. Sherman I am surprised at your blowing up Colonel Codd in this manner." I replied: "Sir, I do not, I only furnish the magazine and leave it to the court to blow him up."

At the same time I delivered to Judge Spencer the set of instructions last received from Codd, and in his handwriting.

Mr. Price said the story of this witness ought not to be received unless it was further shown on behalf of the defendant that the Wilsons had cognizance of the transaction.

The Mayor said that as he understood from the hearing of the testimony, there were two things which the defendant proposed showing: 1st, That there was a conspiracy to induce Isaac Sherman to commit perjury on a former trial; and, 2dly, To show a connexion between the conspirators and the Wilsons. Unless this were shown in the course of the trial, the story of Sherman would go for nothing.

Mr. Emmet stated that it was the object of the defendant to show a conspiracy to suborn Sherman; that this was to be made out by direct testimony or circumstances. He cautioned the opposite counsel, and urged them to suffer the prosecution to take its proper course. He was extremely cautious of anticipating or stating matter of supposition; but if compelled to the measure, he should, after proving this conspiracy, give the declarations of some or one of the conspirators in evidence to the jury, to charge the others. For the present, it was only necessary for him to state, that he expected to show a palpable connexion between these conspirators and the Wilsons. He should urge to the jury, that, from the relation necessarily subsisting between client and counsel, it could not be otherwise but that one, at least, of the Wilsons had a perfect knowledge of the communications between Codd and Sherman.

Sherman, cross-examined: I never declared to any person that I did not believe that Wilson or Dr. Arden had anything to do with this affair; had stated on the former trial, and before the grand jury that I did not know, of personal knowledge, that they, or either of them, was, or were concerned. Wilson was never present at any conference between Codd and me. A day or two before the trial a quarrel happened at the office between Wilson and Codd, when the former told his little boy to kick Codd out of the office, and called him a rascal.

A Juror: Was Wilson's office always the place appointed to meet Codd? *Witness:* It was.

Mr. Emmet: Did you ever hear

Wilson tell anything concerning the advantage he should derive, if Codd gained his cause? *Witness:* After this quarrel, they both came in the front office and made up; and Wilson said, that if Codd gained his cause, he, Wilson, would never want for money. This was before we went to Eastchester.

Mr. Price: To whom did you first communicate the offer you had received from Codd of \$1000?

Witness: To John Lyon and John G. Scholtz. This was about a week before the trial: they were officers, with whom I had been acquainted in the army. Lieutenant Scholtz treated it as an idle thing; but the next time I told him, he advised me to lose no time in finding the lady, or

her counsel, and giving them a full relation of the affair, and not to state anything under oath but the truth.

I made inquiries in many places to find defendant or her counsel. Inquired of Codd, who informed me that she lived in Westchester.

The day before the trial I ascertained, by accident, that Mr. Emmet and Colonel Burr were her counsel. Called on a young man, in the office of the first-named gentleman, and urged him to have the trial put off till I could see Mrs. Codd, for I had something very important to communicate.

Showed the written instructions I had received to Scholtz. Not being able to hear anything concerning Mrs. Codd destroyed the paper, being determined to have nothing to do with the affair. Before the trial delivered another set of instructions which I first showed to Col. Burr and delivered to Judge Spencer.

Mr. Price: What business have you lately been engaged in? I have done the business of a gentleman for two or three months. Have you received any sum or sums of money lately? I have

lately received \$200 from government towards my pension. Have you received none from any other source? I received \$3.50 from Mrs. Codd. For what purpose and on what account? For wheeling three pigs from market up to her house in Greenwich. This surely could not have taken more than three hours. One of the pigs got out of the bag and it took me as much as three hours to catch it.

Charles West: Was acquainted with Codd and had been in Wilson's office when he, Codd, was there. Had heard Wilson say her proceedings were unjust against Codd, and at other times and in various conversations Wilson conveyed an idea to my mind that she had an improper connection with Mr. Bradstreet.

The evening before Wilson went to Albany to argue the demurrer to the bill in Chancery, Codd borrowed \$50 of me which he paid to Wilson, who told Codd that if he minded his business it would be well. Another time Wilson said that if Codd succeeded \$700,000 would fall to him. Know nothing of a certain deed of conveyance of a life estate from Codd to the Wilsons, or either of them.

Mr. Emmet stated that a notice had been served on George Wilson to produce on the trial a certain bond and warrant of attorney from Codd to him, intended to secure to Wilson the life estate of Codd in certain property; that a notice had also been served on Peter Wilson, Jr., to produce a certain conveyance of the life estate of Codd to him to certain property, which notices were accompanied by a subpoena *duces tecum* to each of the Wilsons.

The services of the notices being admitted, upon their nonproduction, defendant had a right to go into parol evidence to prove their contents, without calling on either of the Wilsons as witnesses. The district attorney, standing in the place of the prosecutor, is presumed to have either possession of, or control over, papers relat-

ing to the interests of those he represents. Such was the rule in the criminal courts in England.

Mr. Gardenier contended that the notice served on the district attorney to produce a paper in possession of the prosecutor was inoperative and did not pave the way to secondary proof. The opposite party was first bound to show that the district attorney, who stands on all occasions as the representative of the people, had the paper before he could be called upon for its production; or the Wilsons may be called on as witnesses for the defendant; and they would state that no such papers to their knowledge existed.

THE COURT: The point was entirely new and perhaps not necessary to be decided at this stage of the prosecution.

George Griffin: Am a solicitor and counsellor in chancery. Had been applied to by Matthew Codd to defend the suit in chancery. I declined being his counsel, but this was conditional. Will state the reason. Codd applied to me and related his story and finding it was likely to lead to an extensive range of business and that the controversy was with a lady having several children, I told him I should expect that if he engaged me, a retainer of \$100. I purposely set the charge high thinking it would put an end to the application. He did not comply with the terms and without having passed any judgments on the merits we parted.

Caleb S. Riggs: Am a counsellor in Chancery. Codd applied to me to defend the suit commenced by defendant and told his story. I asked a sum for a retainer which Codd either could not or would not pay, and of course was not engaged.

Henry York Webb: In October, 1816, having some business to transact in Wilson's office, some conversation passed between us on the subject of the divorce. Wilson said among other things, "Damn that Bradstreet; if I was in Codd's place, I would shoot him." He stated that Bradstreet

was continually gallanting her about, and it looked more like the conduct of a sweetheart than that of a relation. Wilson knew I was acquainted with the defendant.

John Bradstreet testified that the intelligence concerning the declaration of Wilson, mentioned by the last-named witness, was conveyed to her as coming from George Wilson.

Charles West: Understood, previous to the trial before Judge Spencer, that I was to be a witness for Codd; but was not examined by Wilson beforehand.

John G. Scholtz: Was a lieutenant in the army during the late war. Sherman, in the spring of 1816, disclosed the offer made to him by Codd, and exhibited a paper, the contents of which I do not recollect. First treated it as an idle story; but upon a further application from Sherman, directed him to find out Mrs. Codd, or her attorney, and disclose the whole affair.

In the month of January preceding, boarded at Sternberg's Hotel, and Codd, then called Colonel Codd, boarded there at the same time. Sherman attended there, frequently, in the capacity of a waiter. Saw Sherman fre-

quently in Wilson's office, and understood the former had employed the latter to draw up certain papers for the purpose of getting a pension. About a week previous to the trial Sherman stated this affair concerning the offer.

Dudley S. Bradstreet: Was introduced, by some person at Tammany Hall, to a man then stated to be Colonel Codd, who had performed great exploits under General Jackson. Am acquainted with both the Wilsons; but uncertain whether the person so introducing Codd was either.

John Bradstreet: Understand, by the witness last named, that he was introduced by Wilson to Codd as one who, for his valorous exploits under General Jackson, was made a colonel on the field, and, a short time afterwards, so informed defendant?

John W. Picket: Heard the same account of Codd in Wilson's office as stated by last witness, but do not recollect whether Wilson was present when such account was given.

Mary Tuttle: Was examined by Peter Wilson, Jr., about a fortnight before the trial of the

feigned issue to ascertain what I would swear. On that trial was sworn as a witness against Codd.

Robert Emmet: Spoke to George Wilson several times on the subject of the controversy between Mrs. Codd and her husband. I gave Wilson to understand that I was a particular friend of this woman and on one occasion cautioned him to say nothing derogatory to her character. Wilson spoke disrespectfully of the character of Mrs. Codd and conveyed an idea that an improper intimacy existed between Bradstreet and defendant. Wilson said it was very strange that she and Bradstreet should be so often walking together.

After the trial of the feigned issue had a conversation with Wilson. He endeavored to remove anything unfavorable on my mind which I might have towards Wilson, touching his knowledge of the attempt to suborn Sherman. Wilson told me he did not know before the trial that Sherman was to be examined as a witness and did not know what he would swear. That the reason he wanted the trial put off was that he had found out that Sherman was a great rascal.

Mr. Price, after reading that part in the publication relating to Mr. Baldwin, inquired of the witness, whether, on the trial of the feigned issue, that gentleman stated anything indecent in his address to the jury?

Mr. Emmet requested to know whether Price appeared as the counsel of Mr. Baldwin?

Mr. Price replied, that he appeared for the people.

Mr. Emmet objected to the inquiry, on the ground that Mr. Baldwin's name had been joined with the others without his knowledge or concurrence. He had never appeared as a prosecutor; and wished to have nothing to do with the affair. If the gentleman, however, persisted in the inquiry, the counsel should be compelled, contrary to his feelings, to prove the precise words uttered by Mr. Baldwin, alleged to be indecent, in his address to the jury.

Mr. Maxwell stated, that although *Mr. Baldwin* had, on no occasion, appeared as a prosecutor, yet, the complaint relating to him was incorporated in the indictment, and was regularly before the court. The counsel did not feel himself authorized, nor was he aware, that he had the power of withdrawing any part of the indictment.

THE COURT: We think it is competent for the public prosecutor to withdraw any part of the charges contained in the indictment, at any stage of the cause, should he think proper.

The counsel for the prosecution refused to withdraw that part of the indictment concerning *Mr. Baldwin*.

John Bradstreet testified concerning certain expressions, considered indecent by the witness, which were used by *Mr. Baldwin* in his address to the jury on the feigned issue. The expressions used referred to *Mrs. Cannon*, a witness sworn on behalf of the plaintiff, on the trial of the feigned issue.

John McKesson: Am clerk of the Sittings: Had an affidavit in the handwriting of *George Wilson*, sworn to by *Codd* for the purpose of putting off the trial of the feigned issue for the want of a material witness. The affidavit was sworn in open court and *Wilson* made the motion as counsel.

Mr. Price objected to the introduction of the affidavit in evidence unless the counsel also would show that it was false, with the knowledge of *Wilson*.

Mr. Emmet stated that he proposed to show that when this affidavit was first read before the court, Judge *Spencer* decided that it was defective; *Wilson* altered it again and it was sworn to and still found defective; and when *Wilson* was about making the third alteration, the judge rebuked him by saying, "Sir, will your client answer to everything you write?" Thus was this affidavit altered three times successively, without once consulting the client.

THE COURT: But the Court nevertheless still received and acted upon the affidavit?

Mr. Emmet: The trial was put off on that affidavit.

THE COURT: We think you ought to bring the falsity of this affidavit home to the knowledge of *Wilson* before you proceed further with this evidence.

Francis Arden: Am a master in Chancery. Saw the answer of *Codd* to the bill in chancery for a divorce. Was applied to by him to administer the oath, subjoined to the answer, of its truth, and informed him that such oath was not necessary, which was one reason why he declined administering it. Believed from the

relation given by *Codd* himself, and for other reasons, that the answer was false.

In my opinion the *Wilsons* were imposed upon by *Codd*. *George Wilson* is a man of very sanguine feelings and temperament. He had no doubt imbibed very strong prejudices against *Mrs. Codd*, from the relation

given by her husband, and expressed himself with warmth. After an acquaintance with George Wilson for a great number of years, do not believe he had a bad heart.

Mr. Emmet: Do you think it proper, or becoming a counsellor, to suffer a client to closet a man in the back office from time to time? I consider it extremely indiscreet; and I should not suffer it to be done.

Isaac Sherman: Have you ever heard George Wilson call in question Matthew Codd's truth and veracity? Codd told a story about his being attacked, at or near New Orleans, by monstrous alligators, and that he had no other way to manage them but by gouging out their eyes. Have heard Wilson ridicule Codd, when absent, about the alligator story, and say he was a great liar.

Charles Holt: Was a member of the grand jury, in May last, when defendant instituted a complaint against George Wilson, Peter Wilson, Jr., Peter W. Gale, John S. Arden, Charles West, and others, for conspiring together to suborn Isaac Sherman to com-

mit perjury on the trial of a feigned issue before Judge Spencer. She appeared herself as the prosecutor, and produced papers and witnesses. An indictment was found against Matthew Codd, and dismissed as against the rest.

Sherman said the set of instructions was delivered by Codd on the road to Eastchester, when in a chair, or gig, with Codd, under an injunction of secrecy to disclose it to no person, especially to Wilson. Three chairs went on the expedition; on the way, Codd, who rode with another, proposed, as his companion was a large man, that I should get in the carriage with the person riding with Sherman, and that he should come in that in which Codd rode. Was asked by the grand jury whether I had any reason to believe that George Wilson had any knowledge of the transaction prior to its disclosure in court. I do not believe Wilson had such knowledge. Am confident Sherman stated to the grand jury that the paper was handed to him by Codd on the road, who instructed him what to say.

FOR THE PROSECUTION

John Coffin Jr. was also a member of the grand jury. Sherman was asked how George Wilson was implicated in that affair. Sherman answered, "I do not know he was nor do I mean to implicate him, but I remember one circumstance," and then he gave an account of a quarrel in Wilson's office between him and Codd in which he was turned out. Think Sherman further said that he had frequent private con-

ferences with Codd in that office.

Peter Wilson, Jr., was a master in Chancery and at the request of his brother, who was unwell, went to a Mrs. Haight's in Park Place and took the examination of Mary Tuttle, who was to be introduced as a witness on the trial of the feigned issue. Codd was a person of that description that it was impossible to learn from him the statement of his case.

Had no knowledge whatsoever of any deed of conveyance of the life-estate of Codd of any property to the witness. A short time before the trial was spoken to by Codd about entering up a judgment on a bond executed to his brother in Philadelphia and consulted with George Wilson on the subject, who said it would be an improper thing, and so advised the client. Did not know of any security received from Codd by brother, but had heard that he received \$50.

The paper spoken of was an assignment of Matthew Codd of a life-estate, in certain property, to Patrick Codd.

Charles Holt did not recollect whether Sherman swore before the grand jury, that he was frequently locked up in Wilson's office, and that Codd delivered him the instructions there.

John Wood: Was on the grand jury when Sherman was examined, and he said nothing there which could implicate the Wlisons, further than that he was at the office frequently with Codd.

George Wilson: I have been subpoenaed here on behalf of the defendant, with a *duces tecum*, to produce a certain bond and warrant of attorney, securing to me the interest and property of Matthew Codd in a life-estate. Have no such instruments, nor any knowledge concerning them. Remember he applied to me to enter up a judgment on a bond to Patrick Codd, of Philadelphia, and I saw a letter authorizing the entry of such judgment; but I refused, and advised Codd against the measure. Have taken no security whatsoever from him.

Had not even the most remote knowledge that Codd intended to suborn Sherman.

Mr. Emmet: Do you remember ever having said anything disreputable to the character of the defendant? *Witness*: From the relation given me by the husband, I had, certainly, imbibed strong prejudices against Mrs. Codd. I have on various occasions expressed myself with warmth on the subject. I have said that I did not consider it seemly or decorous for her to be gallanted about by Mr. Bradstreet, while she was seeking a divorce from her husband. I said this to Mr. Robert Emmet, in a friendly manner, while holding an argument with him. He said that Bradstreet was a relation: to which, I replied that I did not think it was necessary for them to reside together: and I mentioned this, too, as coming from Codd.

The first time I heard that Sherman was to be a witness was the morning of the trial. He was at the office frequently to get some papers made out to apply to government for a pension. Codd was also there and they were in and out until I was perfectly tired of it, and so told Mr. Gale.

Do not know that any deed or security was executed by Codd to any person in trust for me. The night before the trial Peter, my brother, came to me while sick in bed and told me that Codd was a great rascal; that he had just left him at his house, intoxicated, and said if had \$1000 he could easily carry his cause.

After I became retained for Codd and while in the progress

of the business, I received several anonymous letters — some soothing, some flattering, and some threatening. I felt that I had an enemy at every elbow. When the grand jury met, before whom a complaint was made against myself, with others, for a conspiracy, I was solicited by many persons to send a statement of facts before them. This I disdained doing, but at the request of my father I sent a short note to the grand jury requesting them not to act hastily.

Afterwards when the complaint was made against defendant for a libel, two anonymous letters, one to Baldwin and one to myself, were sent in, by my counsel to the grand jury, as I understood. Never had a quarrel with Codd and turned him out of the office, but it was impossible to understand his statement. Frequently called on him for a list of his witnesses, which he never produced.

Peter W. Gale: Was a partner of George Wilson at the time he was engaged for Codd. Do not know concerning any secret conference between Codd and Sherman.

He was then about applying for a pension, on account of being wounded, and was at the office frequently on business relating to that affair. Had no reason to believe that Wilson had any knowledge of the attempt to suborn Sherman; nor do I think that Wilson knew that Sherman was to be a witness until the day of the trial. They were in the office frequently, but I thought it was on another affair. Wilson often told me he was tired of having those persons in the office. He often called on Codd for

his list of witnesses, which, at the time of issuing the subpoena, was not furnished, and blanks were left for their names.

When Sherman testified before Judge Spencer, I was present, and was much surprised. The Judge seemed very desirous of knowing from him what persons were concerned. Sherman said that Dr. Arden had no knowledge of the attempt to suborn, nor did he believe that any other person knew except Codd.

Robert Bogardus: Had known George Wilson fifteen years, and his brother Peter ten, their private and professional character was good.

Previous to the time of the publication in question, had never heard anything against the private or professional conduct of George Wilson; but, about the time this took place, rumors were in circulation against him, and I was afraid Wilson had not done altogether right.

He has a good heart; and having been long acquainted with him never suspected him of having a bad heart. He is a man of very sanguine feelings, and zealous in whatever he undertakes; but, if he has any failing, it is that of being too free and obliging for his own interest.

John Ferguson: Am a former mayor of New York. Had been acquainted with George Wilson and Peter Wilson, Jr., several years, they having practiced under me while mayor. Nothing could be alleged against their private and professional character.

DeWitt Clinton: Am a former mayor of this city, now governor of this state. Have been ac-

quainted with George Wilson eight or ten years; he practiced under me. Ever conceived him to be a very honest and honorable man. His private and professional character was unquestionable; would place the fullest reliance on his oath. The character of Peter Wilson, Jr., was also good.

Josiah Ogden Hoffman: Am a former recorder of this city: Concur with the last two last-named witnesses in the character given of the Wilsons. George Wilson entered my office as a student in

1802 and I always had the fullest confidence in him.

James L. Bell, the sheriff; *Sylvanus Miller*, the surrogate of the city and county of New York, and *Jacob Warner*, one of the police magistrates, and *John T. Irving*, counsellor at law, all concurred in showing the private and professional character of the Wilsons to be perfectly good. They spoke from an acquaintance of several years and from having had dealings in their several official capacities with the Wilsons.

THE DEFENSE AGAIN

Sherman (recalled) stated to the grand jury that on the road Codd gave him a paper containing directions where to find Mrs. Cannon. Did not swear that he received instructions on the road. Was confident Wilson was informed by him that he was to be a witness three or four days before the trial.

Benjamin Hart and *John Graham*, officers in the army during the late war, were acquainted

with Sherman while a soldier; that his character while in that capacity was excellent and that his officers placed the utmost confidence in him. His speech was injured by reason of his wounds, which led some to think he was subject to intoxication, until explained; which never was the case with him; for he was very temperate. Had known him fifteen or sixteen years, and had never heard his veracity questioned.

THE SPEECHES TO THE JURY

Mr. Wilkin (to the jury): It was not his intention, in this case, to insist that the Wilsons were guilty of being concerned in the attempt to suborn Sherman; this was not necessary for his argument. But he should insist, from a variety of facts detailed in the testimony, that the defendant had the strongest grounds for believing one of them to be concerned. In the first place, George Wilson was the attorney of Codd, and is presumable to have known the grounds of his client's case. In the second place, Mrs. Codd attended the trial of the

feigned issue, and heard the testimony of Sherman. She heard him say, as he has sworn this day, that all the communications which Codd had with Sherman transpired at Wilson's office. And was there anything which ever happened, more nefarious—more abominable than the plan of going to Eastchester with Sherman to see Mrs. Cannon, for the purpose of giving a colour to a statement of facts to be related by Sherman which was utterly false? From what Sherman had stated, under oath, and from every circumstance, the defendant had the strongest grounds for believing that Wilson must have known of this attempt. And yet, strange to tell, it has been proved, on this occasion, that Wilson did not know, until the night before the trial, that Sherman was even to be a witness.

The subject-matter of the former trial was highly interesting to the feelings and reputation of the defendant—her all was at stake—for, if Codd had obtained his purpose, by defeating a recovery, he would have been entitled to the use of the third of her property during his life.

That Wilson aspersed her character, on various occasions, in a manner calculated to do her the greatest injury, is abundantly established, and even admitted. It is true Mr. Webb was mistaken in the person, but the language was conveyed to the defendant as coming from Wilson, and was actually uttered in his office.

Wilson himself was the cause of this publication, by giving currency to unfounded insinuations against a lady who, from the peculiar situation in which she then stood, was unable to vindicate her wrongs, or assert her innocence in any other mode.

Should the jury, therefore, be convinced that she had strong reasons to believe the knowledge of Wilson in this attempt to suborn Sherman, though at the same time they may think she acted under a mistake, it will be their duty to acquit.

Mr. Emmet: It was not for the purpose of judging concerning civil rights, or awarding damages, that the jurors were impanelled; they came into this court to *punish crime*. I admit that if, instead of instituting a criminal prosecution for

this publication, the Messrs. Wilsons had resorted to a civil action, and that was now the subject of consideration, you would have a different question to determine: for, in a civil action for a libel, nothing but the truth can be received as a justification. But in the mode which the gentlemen have adopted, they have put it to the jury to try—to investigate, and to scrutinize the *intention*. I assume this as the basis of my argument, and am ready to meet them on the ground they have chosen. I shall demonstrate to the jury, that the defendant is to be acquitted from any criminality of intention in this publication. I must confess to you, gentlemen, that before this investigation had taken place, I much regretted, and was grieved at the delinquency of one who, in my estimation, until his unfortunate retainer in the business against the defendant, was in very respectable standing in an honourable profession. I had a stronger reason for being grieved, because he was an intimate relation of my former friend and partner. That this prosecutor should so far have deviated from the path of rectitude prescribed by the precept and example of a truly venerable father—that he should so far have lost sight of the dignified morality upon which our profession is founded, as to have countenanced, for a moment, or even winked at, so daring and nefarious a conspiracy as has been proved before you, I must say, gave me many painful emotions. This investigation has removed those unfavourable impressions from my mind; and it is a subject of peculiar satisfaction to me, that while asserting, before you, the purity of the motives which actuated my client in this publication, I am not compelled to arraign the motives of the gentlemen who instituted the prosecution.

My client was the mother of a family of five children, whose welfare and future prospects were involved in the fame of that parent. Her daughters were just rising in life, and they looked up to the mother as their only guardian and protector. Yet the reputation of that mother was aspersed; and insinuations circulated which were calculated to inflict the most serious injury on her character. She could not appeal to the laws of her country for redress, for a married woman cannot sustain an action for such wrongs. The weakness of her sex

forbid the infliction of a just chastisement on the authors of her sufferings.

In her rising family, so estimable, so dear to the parent, all her future hopes and fond anticipations were centred. She beheld her progeny with maternal tenderness, embittered with the poignant reflection that her own reputation, so important to them, was assailed and made the subject of obloquy and reproach. With such feelings, what must have been her situation? You alone, who are fathers, can conceive; and, yet, your ideas must necessarily be inadequate; for such feelings enter none but the mother's bosom. Her object was to retrieve a character attempted to be sullied, and to rescue her fame from the foul touch of calumny; and I rejoice that an opportunity is afforded. She has provoked this investigation, and she calls on a jury duly to appreciate and scan her motives.

Did this publication originate from unfounded suspicions, or idle rumour, or conjecture? You have seen that two gentlemen of the profession had been applied to, and they declined being retained by Codd. This information she received; and it was natural for her to believe and to reason in the mode disclosed in the publication. The client, also, was poor; and what prospect had the counsel for remuneration for his services?

Receiving information, also, as we have seen, that Wilson had said, that he would never want for money if Codd gained his cause, her suspicions were awakened, and she had a right to believe that the counsel was actuated by avaricious motives.

Couple with this the relation made by Sherman, which we have heard, and can we hesitate in saying that her reasons for belief were strong and irresistible? It was not from the information of Sherman, merely, that she acted: she had seen him, in open court, exhibit the set of instructions received from Codd, and swear that he had refused the bribe of \$1000. All the communications he had received, touching this offer, took place, in secret conferences, in Wilson's office. The client, it appears, had access to every part. Could anyone have supposed, therefore, that Wilson did not know it? Should he, ought he not to have known this? Standing in the relation of

counsel, in an important controversy—a controversy which involved the future fortunes of his client, was it not the duty of that counsel to examine, inquire into, and thoroughly understand his client's case? Should *he* not know what one of the most important witnesses his client had was about to testify? Above all, ought he to have suffered secret conferences to have taken place in his back office, the purport of which he did not know? His friend, Mr. Arden, in his testimony, has given him a salutary caution on this point, which, I hope, he will never forget.

Gentlemen—I assume this as the train of reasoning in the mind of my client, upon which her conclusions were founded. And I appeal to you, whether, standing in her situation, you would not have believed as she did, and been prompted to act as she did? For, is it conceivable—is it within the range of possibilities, that Wilson should not have ascertained what all the witnesses would say; especially when the client was so stupid as not to be able to impart to his counsel his ideas concerning his own case? And yet, wonderful to relate, it has been proved, beyond a contradiction, that Wilson did not know, until the day of the trial, that Sherman was to be a witness!

It was necessary that a transaction so involved in mystery—so strange—so unaccountable, should be explained by the positive testimony of the parties: and it was necessary for a public investigation, to rescue the fame of my client from obloquy and reproach. That the gentlemen have thus explained—that they have cleared their character from a just suspicion, I rejoice: it was but a mistake on her part, and I am willing to consider it in that light.

Mr. Price: If your client will acknowledge this in writing, we will immediately withdraw the prosecution.

Mr. Emmet: We shall sign no statement or acknowledgment in writing: we put our case to the jury as it stands, and shall call on them for an honourable acquittal. The many aspersions cast on the character of my client, the many unfounded insinuations propagated to her prejudice, lead her proudly to reject

all propositions for a compromise, and to repose on the intelligence and discretion of a jury.

For some reason, which I am unable to explain, the name of Mr. Baldwin has been joined with that of the Wilsons in this indictment. That gentleman mentioned to me that he never appeared as a prosecutor, nor did he wish that his name should be called in question. He even went before the grand jury and requested that his name should not be used in this prosecution.

Gentlemen—On this occasion, you are not called upon to try the Wilsons; and, for the purposes of this trial, much of the testimony of character, which I am happy to find so ample and satisfactory, might have been omitted. You are to determine a pure question of intention—you are to decide whether the defendant has made this publication with malicious motives.

If you think that she had abundant reason for believing the facts detailed before you in the testimony—if you, placed in her situation, could not but have credited them yourselves—if, in short, under all these circumstances, you consider that she acted as became the mother, solicitous for the honour and future welfare of her family, you must acquit. For again I beg you to bear in mind, that you are to render a verdict, without regard to any supposed consequences affecting the feelings or character of the prosecutors. The defendant, on her part, conscious of the purity of her intentions, is anxious of retiring to the bosom of her family, with the innocence of her motives sanctioned by your verdict. But if, under all the circumstances, you cannot avoid the conclusion of her guilt—if you cannot entertain a doubt but that she was actuated by malicious intentions, however painful to her feelings, she must submit to your decision. But she implores you to weigh well the circumstances of her case before you pronounce—to consider her peculiar situation under the unmanly aspersions cast on her reputation—and, with the many powerful reasons with which she was actuated, in your view, to inquire and put it to yourselves, whether such a situation and such reasons

would not, on your part, have produced a correspondent action?

Mr. Price said that his fears for the result of this trial were already almost realized. He knew the justice of the complainant's cause—he was convinced of the integrity of their conduct—but he felt that the defendant came into her defence with advantages against which it was almost impossible to contend. Her sex—the accomplishments with which she had graced it, and her personal presence through a long and tedious trial, were among the allurements with which justice had been tempted to connive at her acquittal. She had, also, brought in aid of her cause as learned and eloquent an advocate as this or any other country could produce.

If, therefore, the means of which she is fortunately possessed, or the manner in which they have been employed, were to determine this cause, I should at once abandon it as a hopeless prosecution.

It is unnecessary to vindicate the character of the Messrs. Wilsons; for the defendant's counsel had acquitted them of all participation in the subornation of Sherman.

The whole defence is placed on the want of malice in a publication admitted to be false. It is said, however, that the publication was made under a conviction of its truth. Be it so—and where is the justification of the defendant? That it was made under such circumstances, would, undoubtedly, be proper for the consideration of the court in measuring a punishment for the offence: but that it could ever be received by a jury, in complete exculpation of the accused, is a doctrine which would be as pernicious in its consequences as it is unsupported by authority.

Previous to the case of *Croswell*, 3 Johns. Cas. the truth itself could not be admitted to justify the defendant; our statute has admitted it only when published with good motives. But neither our legislature nor our courts have ever said, that a falsehood, vitally affecting the character of another, could be published with impunity. Can it be necessary to illustrate so plain and safe a principle? A disappointed suitor says of the judge who has decided against him, that "he has

received a bribe for his decision." He tells his story with an air of sincerity, and relates circumstances which never existed, from which such a conclusion might be drawn. The printer, honestly believing his story, and with the best motive that could actuate any human being, that of bringing a guilty man to justice, publishes the charge. He is indicted for the libel—he offers these facts in evidence, and demands his acquittal. Such a law of libel would be a senseless mockery of justice. Private character would be everywhere assailed, and the public peace continually disturbed.

But, if malice was not the legal inference from a false and defamatory publication like the present, what is the positive evidence of its existence? In the very opening of the publication she declares revenge to be her object. She assails the complainants in their private as well as in their professional character.

Previous to this publication, she meditated an attack of a very different nature. She appeared before the grand jury, and charged the Messrs. Wilsons with conspiring, with others, to suborn Sherman. Finding that her accusation was regarded by that tribunal as utterly groundless, she resorted to this publication, as a means of gratifying the passion with which she avows she was governed. If "any publication, exposing another to obloquy or ridicule, and made with a mischievous and malicious intent," be a just definition of a libel, then is the defendant, in this case, guilty.

It has been insinuated by counsel, that the Messrs. Wilsons expected something more than the ordinary remuneration for their services: a deed of conveyance has been spoken of; but where is the proof of its existence? And a reason stated is, that their employer was too poor to have made any other terms with them.

I might now retort on the gentleman, and inquire how he expected remuneration for his services; for, at the commencement of this unhappy controversy, his client was also poor.

Mr. Emmet: I can explain this to the jury.

Mr. Price: The gentleman need not; for I shall concede to him, in as full a measure as he can wish, that he was actuated,

in his retainer and management of this business, by motives purely benevolent. I only ask him to have the charity to believe that others might be actuated by motives quite as laudable.

On no occasion have I ever witnessed more ample testimonials of character than those produced by the complainants before you. The governor of our state has, in the most unqualified manner, declared that the character of George Wilson is unquestionable. Mr. Ferguson, the former mayor, Mr. Hoffman, the former recorder, under whom, as well as the governor, while mayor, Mr. Wilson practised for a number of years, have concurred in bestowing upon his private and professional character their entire approbation.

It has been said, however, that character is not the object of your inquiry, and that your verdict must be rendered without regard to the situation or feelings of the parties. If so, why did the gentleman press into his service the maternal fondness of his client? Why his bitter reproof of the unjust aspersions cast upon her character?

It is not to be disguised, even by the eloquence of that gentleman, that in this court, and in a case of this description, though the people stand upon the record as the accusing party, yet, in effect, the rights and feelings of the accuser, as well as of the accused, are as much involved, as they would be in a civil suit for the same libel.

The counsel who last addressed you, has made an appeal in behalf of a mother and her female children. I witnessed the effect it produced on you. If such considerations are to be permitted to influence a jury, I can tell you, with more truth than eloquence, that the complainants have wives and children anxiously waiting the result of this trial—that they also have an aged father,^{*} proverbial for his integrity and learning, expecting that the care with which he has watched them through life, will be rewarded by a verdict, which in the

^{*} The gentleman alluded to was a professor of the languages, and of Grecian and Roman antiquities, in Columbia College, for about thirty years.

language of the testimony, shall place their characters beyond suspicion.

THE CHARGE TO THE JURY

THE MAYOR said that he had hoped this case would not have occupied so much of their time as it had. The object of the court had been, to shorten the investigation as much as possible; and it was to be wished that the offer of a compromise tendered by the prosecutors had been accepted. The court saw no reason why this offer had been rejected. The parties, however, for reasons of their own, into which it is not necessary to inquire, had thought proper to throw the burden of deciding the case on the court and jury.

Generally speaking, a leading inquiry in cases of libel is, whether the publication is, or is not, true? But this is not the only or correct criterion by which a jury is to determine such cases. A publication, true in every part, may yet, from its peculiar nature, be a libel. To ridicule the imperfections or deformities of an individual, which in fact exist, is libellous, because originating from a mischievous or malicious intention; and, on the other hand, a publication may be false, and yet not a libel. A printer, for instance, may find a publication in another paper, and, having sufficient reasons for believing it true, give it further publicity with pure and innocent intentions. It may turn out that the publication is libellous, and, on inquiry, may be found untrue; and, yet, we cannot say that the printer who republished it ought to be punished criminally.

Therefore, truth or falsehood cannot be the only criterion by which to determine, whether a publication is, or is not, a libel: but the principle or rule, in such cases, by which the decision of a jury is to be governed, depends on the intention or motive with which a publication is made.

In the first instance, a publication containing matter injurious to another, is deemed to be libellous; and, therefore, on this occasion, the counsel for the prosecution, after reading the publication, rested the case. The burden of proof was

then cast on the defendant, on whom it was incumbent to show the truth of the matter alleged, or to explain the motives by which she was actuated. She has entered into the proof of a number of circumstances for both these purposes; and it will rest with you to decide, whether they are sufficient to justify her conduct, or the motives upon which she acted.

There appear to be, in this publication, two principal charges alleged against Mr. George Wilson: 1st, That he had endeavoured, on various occasions, to injure her character; and, 2d, That he was either engaged in a conspiracy, with others, to suborn Isaac Sherman to commit perjury, on a former trial, for the purpose of invalidating the testimony of a Mrs. Cannon, a material witness for the defendant, or, that he was privy to the attempt, on the part of Matthew Codd, for that purpose. With regard to the first charge, some testimony has been produced by the defendant, which goes to show that her character had been assailed by Mr. Wilson, and that she had reason to repel or resent the injury.

But the most material charge in the indictment, and, indeed, that principally relied on, is, the charge of subornation. It will be readily admitted, that this is one of the most serious nature, especially against a professional man. It ought not, therefore, to have been made but on sufficient grounds; and a party who will undertake to make such a charge from idle rumour, surmise or conjecture, should it prove unfounded, ought to be responsible for the consequences.

It is urged, on behalf of the defendant, that, from the information she had received, she had good reason to believe the matter to be true upon which the insinuation of this charge in the publication was founded; and it is particularly urged that, as all the communications from Codd to Sherman took place in the office of Wilson, who was the counsel in the case, the defendant had the strongest reason for believing that he must have been cognizant of, or privy to, the attempt to suborn Sherman. This was a circumstance, and nothing more; and, unless supported by other evidence, was not sufficient, in the opinion of the court, to justify the charge; and we think it now appears that he was not present at any of those com-

munications. But it is not the business of the court to express a decided opinion on matters of fact; and the evidence on this point must, therefore, be submitted to you. I think, however, we ought to say, that she had no right to make so serious a charge against an individual on slight grounds; nor ought she to be permitted to excuse herself beyond the information she actually received and had reason to believe was correct.

Should you believe that she made this charge on trivial grounds, or such as were not, under the circumstances in which she was placed, entitled to her credit, or that she went beyond the information she actually received, I think she ought to be held answerable for the consequences, and liable to this prosecution. But if she possessed the information from sources which appeared to be entitled to confidence, and was actuated by fair motives, in the defence of her own conduct and character, she then could not be considered as being influenced by unjust or malicious intentions towards the prosecutors.

On the whole, this is a case peculiarly depending on the question of intention, of which you are to judge from all the facts and circumstances. If you believe these charges originated from improper or malicious intentions towards the prosecutors, you ought to find the defendant guilty, but if no malice existed on her part and you believe that her object was to vindicate her own conduct or character, she ought to be acquitted.

THE VERDICT.

The jury retired at three o'clock in the morning and in two hours returned with a verdict of Not Guilty.

THE TRIAL OF HANNAH KINNEY FOR THE
MURDER OF GEORGE T. KINNEY,
BOSTON, MASSACHUSETTS, 1840.

THE NARRATIVE.

The evidence given on this trial is interesting reading, but the case is of value to the lawyer because of the able speeches made to the jury by the eminent lawyers on both sides and the charge of the great Chief Justice of Massachusetts, Lemuel Shaw.

Mr. Kinney, a respectable citizen of Boston, being taken ill, his wife sent for a physician who pronounced it cholera. He begged for drink and she brought him a cup of herb tea, which a friend who was in the sick room tasted and afterwards testified that it had a sweet taste, that there was a sediment on the cup and that it made him ill. Several other physicians treated the sufferer, who all thought he was suffering from cholera until a post-mortem disclosed the presence of arsenic in his stomach. But there was no evidence to show that the wife had any of the drug in her possession and a quack who had been treating him before the regular physician was called in, might very well have given him arsenic in the different compounds he administered. This incident of the herb tea and the fact that the prisoner had several husbands before Kinney married her and that she did not express much surprise at his sudden death, were about all the circumstances which could be said to point to her as the agent in her husband's death.

The jury took but three minutes to render a verdict of not guilty and the community, including the entire Boston bar, endorsed their action.

THE TRIAL.¹

*In the Supreme Judicial Court of Massachusetts, Boston,
Massachusetts, December, 1840.*

HON. LEMUEL SHAW,² *Chief Justice.*

HON. SAMUEL PUTNAM,³ }
HON. SAMUEL S. WILDE,⁴ } *Judges.*

December 21.

The clerk read the indictment which charged the prisoner Hannah Kinney with poisoning her husband, George Kinney, in August last, with malice aforethought, by mixing arsenic in drink prepared for said George, with intent to murder him. The indictment set forth that the the arsenic was mixed in herb tea prepared for the deceased, who was sick, which he drank on the 9th of August and died on the 15th. (The death actually took place on the 9th. The indictment alleged the farthest day, as matter of form.)

The Prisoner pleaded *Not Guilty*.

The jurors were then called and impaneled, consisting of Abraham W. Blanchard, foreman (appointed by the Court) Charles Arnold, James M. Barnard, Sewell Barker, George W. Bazin, James Blake, Franklin E. Blood, Francis Codman, Josiah W. Daniel, Nathaniel G. Elliott, Elisha Faxon.⁵

¹ *Bibliography.* "Trial of Mrs. Hannah Kinney for the alleged murder of her husband, George T. Kinney, by poison. Before the Supreme Court of Massachusetts, Judges Shaw, Putnam and Wilde, present, sitting at Boston, from Dec. 21st to Dec. 26th, with the arguments of counsel, and the charge of the Chief Justice fully reported. By a member of the Bar. Boston: Times and Notion Office, No. 5 State Street. 1840."

² See: 1 Am. St. Tr. 442.

³ See: 1 Am. St. Tr. 108.

⁴ See: 4 Am. St. Tr. 97.

⁵ Mr. Curtis remained beside the prisoner while the jury was empaneled. She scrutinized each one and evinced much composure until it was complete when she seemed overcome with the effort and shed tears. Her appearance was most prepossessing and her face beautiful. During the examination of witnesses her attention to every word they uttered was intense.

James T. Austin,⁶ Attorney General and *S. D. Parker*,⁷ for the Commonwealth, *Franklin Dexter*⁸ and *George T. Curtis*⁹ for the Prisoner.

MR. PARKER'S OPENING.

Mr. Parker—Gentlemen of the Jury: No man can be engaged in more affecting or appalling official acts, than in commencing, pursuing and pressing investigations, in which the ultimate safety of all men is involved, and which are especially designed to terminate, as in this case, in the deliverance or destruction of a human being, placed in jeopardy under the most distressing accusation. The utmost care and caution in such proceedings are enjoined by the rules of law; and every measure, suggested by the strictest regard for justice, and the most laudable love of mercy, is taken, to remove prejudice, to preserve impartiality, and to secure the attainment of truth. In this interesting and awful business we are now here engaged; and I hope that all who are to take part in this most serious trial,—counsel, witnesses, judges and jurors,—may conscientiously feel the weight of that great responsibility, which, without our seeking has been cast upon all of us at this time, and in this place, by the laws of our country.

It is my very unpleasant, yet my official task, to open this important and interesting case before the honorable Court who here preside over our proceedings, and before you, gentlemen, who are now engaged by the solemn sanctions of your oaths and the obligations of conscience, in the sight of God and of your fellow citizens, to do justice and right between the Commonwealth and the unhappy prisoner you have in charge. It is not, on my part, any affectation of sensibility to declare, that I feel oppressed, not only by the awful consequences to which this trial may lead, but by the numerous difficulties in it which are to be surmounted; difficulties now very common in all capital cases in the present agitated state of public opinion in relation to the punishment by death;—difficulties, much increased, when the atrocious crime imputed to the prisoner is alleged to have been committed by that subtle and generally invisible but most tremendous agent, the most detested of all means of homicide, secret *poison*: difficulties, which also become yet more formidable, when the horrible charge is made against a woman, usually the most amiable and innocent part of human nature. Whenever in any case, the life of a human being, the gift of God, and one of the most precious of His grants,

⁶ See: 1 Am. St. Tr. 44; 12 Id. 337.

⁷ See: 6 Am. St. Tr. 672.

⁸ See: 7 Am. St. Tr. 414; 12 Id. 338.

⁹ CURTIS, GEORGE TICKNOR (1812-1894). Born Watertown, Mass., member Mass. Legislature; a leading lawyer and legal writer. Died in New York City.

is by the laws of the land demanded as the forfeit of an act alleged to have been done in violation of law, the minds of men, before they allow the highest punishment to be exacted, require what, in the acknowledged obscurity which usually covers personal motives and conceals criminal actions, cannot always be obtained, unequivocal proof, which *excludes* all reasonable doubt of that particular act having been done by the party accused.

The terrible consequences of a possible mistake in making up a judgment from human testimony, and circumstantial evidence, have often inclined jurors in capital cases to acquit, when, as reasonable men out of court, acting upon the common presumption and faith which govern mankind in ordinary occurrences of life, they believed the accused to be guilty, and would have returned a corresponding verdict in the trial, if the punishment which was to follow such verdict were less fatal.

In the course of centuries, it is supposed a few such lamentable mistakes have been made by juries; and the records of them with all their appalling consequences are usually cited by prisoners' counsel in cases depending on circumstantial testimony: and yet the evidence of those fatal results being unjust has sometimes rested on no better foundation, than the wholly uncorroborated and often suspicious confession of some hardened and convicted felon at the gallows, who disregarded truth all his life time, and would not have been received as a competent witness concerning the most trifling matter in any court of judicature.

But the danger of such painful errors has long since passed away, for so tender in cases of homicide have modern tribunals grown, and especially in this country, that juries are now strongly impressed with lively sympathies for the living and interesting beings who stand trembling before them, for relief or for deeper woe; and are so much alarmed by the loud and solemn predictions of the awful and irreparable consequences of an unfavorable error of judgment, that they at the present day are apt to seek, not so eagerly for indications of guilt, as for reasons of acquittal, by which they may escape the upbraidings of their conscience, while they yield to the grateful feelings of compassion. The invisible dead are soon forgotten; no warm sympathies arise out of the cold, neglected grave; the senseless, unseen, absent, defunct, mouldering body excites no commiseration: the living, breathing, palpitating flesh and blood, full of tremor and anxiety, which stand in danger before our eyes, engage and absorb all our sensibility. When too that flesh and blood are arrayed in the form of a full grown woman, distinguished for personal beauty, extraordinary talents, uncommon accomplishments, and of respectable rank in society, there is danger on the other side, that those sympathies for the living may prevail over the love of truth, may obliterate justice to the dead, and sway men to the side of mercy which may be unmerited, and to a decision, which, under the same proof, might have been the reverse of favorable, were a man on trial. Recent experience has shown

how difficult, if not impossible, it has been to obtain a verdict of condemnation, in cases of alleged murders by secret poison, when females have been the parties accused, and men were the persons murdered. I need not mention the cases of Lucretia Chapman¹⁰, Eliza Norton, and Phebe Ann Floor. There are some who think it was the sex, only, of those defendants, which saved them from the punishment of the law.

Yet all must acknowledge that justice, like the great Author, should be no respecter of persons; it should regard neither sex nor age, but only law and truth. By our State Constitution, the fountain of mercy is located and opened *elsewhere than in the jury room*, and is not allowed to flow, even through the clemency of the Supreme Executive, in any case *until after conviction*.

It has been well said, that mercy is *mitigated punishment*, not a *denial of justice*; and it is clear, that the protection of human life upon a large scale, and therefore the most comprehensive compassion for human beings, requires that all murderers should be punished, for there can be no security for the lives of mankind, if there can be no punishment for murderers and assassins.

No one therefore has ever been engaged in a trial for homicide, more especially in one resembling the present, who has not seen and felt that there are difficulties, prejudices, sympathies, anxieties and embarrassments to be overcome; difficulties on both sides; embarrassments in the feelings, and difficulties in the proof. Mankind are naturally horror-struck by a cruel and atrocious act of domestic perfidy; indignation, execration, and an instinctive desire of vengeance combine to endanger and overwhelm the accused, and sometimes to paralyze even a well grounded defense. On the other side, when time has obliterated first impressions, when the grave conceals from sight the murdered victim, when nothing is beheld but a living, trembling, anxious, beautiful, talented and unfortunate woman standing before us, for life or for death, appealing to, and striking all the merciful chords of our hearts, then all our sympathies cluster around her, our desires rush to her relief; and law and justice, truth and duty are in danger of being disregarded. If moreover the homicide is alleged to have been perpetrated by secret poison, the required proof also presents difficulties as great and numerous as those arising from the feelings. The offence is easily committed: but the guilt of the accused is rarely capable of being clearly or satisfactorily established. The instrument of death is not manifest like a sword, pistol or dagger; but generally invisible, prepared in secret, disguised and administered in an unsuspected form, in food or medicine, presented by hands beloved, making no open ghastly gash or bleeding wound, traced by no gushing of out-poured blood, but operating out of sight of all men, and in the absence frequently of the very murderer, and sometimes receiving additional vigor and fatal power in the common means taken for relief against the pains of the first attack. There is seldom an

¹⁰ See: 6 Am. St. Tr. 99.

accomplice, who might turn State's evidence. The felonious design is formed in secret, and the murderous secret is commonly confined to the guilty bosom in which it had its fatal birth; no suspicion of poison existing, its effects are often mistaken for symptoms of cholera and other natural diseases; and the horrid truth is seldom discovered but by a post mortem examination, and difficult and often doubtful chemical processes: and so many and perplexing are the embarrassments in these trials arising from the required certainty in the truth which Courts and juries demand, that the imputed guilt is seldom made clearly manifest, but by those apparently accidental means, those unguarded circumstances, those overstrained, officious, workings and efforts of a guilty, troubled, sin-stung mind to screen its crime, too great to be confined within the conscious breast, from the public eye, which generally betray the criminal to human view, and are, for wise purposes doubtless, the interventions of an overruling Providence.

With these difficulties fully foreseen, and others also which need not be mentioned, the greatest and most unaffected anxiety therefore, is naturally felt by all who are obliged by official station to engage adversely to the prisoner in such solemn and painful investigations as the present, lest on the one side an irreparable and most horrible mistake should occur in inflicting a cruel homicide upon an innocent person through the forms of law; or, on the other side, a judicial tribunal should permit a culprit, guilty of the most atrocious of all crimes, to be set at liberty for a repetition of the guilt of destroying human beings, and for the encouragement of other malicious persons in like murderous cases to offend. We are in danger in such cases of pressing the evidence too much, or too little; in one case, injuring, though unintentionally, a most unfortunate woman in the hour of her greatest distress and peril; or, in the other case, leaving undone what the Commonwealth and the necessary protection of human life require of us for the punishment of crime, and the safety of society. We sincerely wish in this emergency to discharge only our duty fairly, and maintain nothing but the truth of the case, that you may on your part do what justice, and your solemn oaths, and the laws of the Commonwealth, require at your hands.

Your oath, gentlemen, contains the definition, and is the guide of your duty. In the sight of God and man, you are to give a true verdict in this trial between the Commonwealth and the prisoner according to the evidence. The humane maxims of the law clothe this prisoner like all others in the very outset, with an entire presumption of innocence; they cover her with a legal panoply which is to protect and save her, until it be penetrated and destroyed by the evidence of her guilt. It may not therefore be improper for a moment to consider what, under such a charge, that evidence should be, what its nature, and what intelligent men should expect in a case like the present.

Evidence is direct and positive, or circumstantial and presump-

tive. It would certainly be unreasonable to expect crimes, especially those of deep atrocity, to be often proved by direct and positive proof. Innocent acts are done before witnesses; but crimes are disreputable, dark and dangerous. Culprits commonly practice so much secrecy, that much sagacity and great efforts are necessary to detect them. Mankind are obliged to rely much on circumstantial and presumptive evidence on many important occasions, and especially for the conviction of criminals. In capital trials mistakes are very rare on the side of punishment, but very common on the merciful side. If it is better that a hundred guilty escape than that one innocent person be punished, that consummation is attained. In point of fact, from the imperfection of human tribunals, uncertainty of human testimony, the humane presumptions of original innocence, and the compassionate feelings of juries, instead of a hundred, thousands, nay, TENS OF THOUSANDS, of guilty persons have been acquitted, for *one innocent* man that has been punished. When, therefore, circumstantial evidence does convince a jury, there should be no unwillingness or refusal on their part to declare the truth, because positive and direct proof is absent. Most especially how very unreasonable it would be to expect direct, clear, full, positive evidence in any case of SECRET POISON! But even positive testimony, if required, may be less satisfactory in many cases than a train of concurrent circumstances progressing in a path of light to the full truth; for eye witnesses may be false, may be bribed, may be malicious, may be mistaken: their minds may be weak, their morals bad, their veracity questionable.

A learned American Judge, presiding in a case of poisoning, has estimated the comparative value of these two species of evidence, and I beg leave to ask your attention to his judicious remarks. (See Lucretia Chapman's trial, 6 Am. St. Tr. 99).

Also, Sir Francis Buller, one of the most able and learned English Judges, also in a trial for murder by poison, expresses similar opinions.—(See Capt. Donnellon's trial, page 159.)

There are defects and advantages in each of these kinds of evidence; and I have directed your attention to them because, in the present case, both kinds will be offered to you in support of this indictment. Of some of the allegations in it the evidence will be express and direct; of other parts the proof will be circumstantial and presumptive; and we admit that the whole must be so satisfactory and convincing to your understanding as to remove all reasonable doubt of the guilt of the prisoner. Moral certainty only is required, not the certainty of mathematical demonstration; but if reasonable doubts remain the law discharges her.

The death of Mr. Kinney took place on Sunday, the ninth day of August. Events the week before and week after will become material.

The record and issue in this case present the following questions for your decision, and when you have satisfactorily answered them, you will find your duty will have been finished.

1. Did George T. Kinney die in consequence of being poisoned?

2. Was it a case of suicide?
3. Did the prisoner administer that poison, or did some one else?
4. If the prisoner administered the poison, was it administered feloniously or by accident?

By presenting this accusation the Grand Jury have placed on us the very disagreeable and painful task of offering and urging before you all the evidence we could obtain, shewing and tending to prove that Mr. Kinney was poisoned; that he did not commit suicide; that the poison was disguised and given to him by his wife, who is now on trial for that act; and that it was administered with aforethought malice, and not by accident. If after an honest discharge of our duty, the testimony is not strong and conclusive enough to satisfy this human tribunal of her guilt, the presumption of her innocence here must stand, and she must be acquitted, and discharged from the custody of the law; and if nevertheless she be actually guilty of the detestable crime imputed to her by the grand inquest, her punishment must be left to that Omniscent Being, who knoweth the secrets of all hearts, from whom nothing is hid, and who is a God of truth and justice as well as of mercy.

On the twenty-sixth day of November, in the year eighteen hundred and thirty-eight, the late George T. Kinney was married in this city, by the Rev. G. W. Blagden, to Mrs. Hannah Freeman, the prisoner at the bar. He had never been married before, and if I am rightly informed, he was five years younger than she was.—The lady had been married twice before, and had children by her first husband, but none by either of the other two. In August last they lived in Ballard place, Bromfield street, in Boston. On the 9th day of that month, he died in much pain and distress, after a short illness.—He had a few days before consulted a person who called himself a physician, and took some medicine on two occasions in the form of a pill delivered to him by that person. His illness did not confine him to the house. The ingredients of that medicine will be proved to you, and it will be satisfactorily proved there was no arsenic in it; and also that the pills and its ingredients would not produce the symptoms and effects which preceded his death, nor endanger his life. On Saturday, the 8th day of August, in the forenoon, he became so unwell as to retire to his chamber, and he grew worse in the afternoon and evening. A male friend and neighbor was called in to see and watch with him, and was sent out for a physician in the course of the night. Before he went and before the physician came, Mr. Kinney wanted some drink, having a burning thirst, and the prisoner about midnight left the chamber and went below stairs while the rest of the family were in bed in the chambers; and after being absent some time, she brought up from the kitchen a pint bowl of sage tea, a beverage which was first recommended not by her, but his friend, and placed it on the bureau; and then she immediately threw herself down on the bed, complaining of being fatigued. Mr. Kinney requested her before she went down to make the tea, not to sweeten it. Being impatient for

it, after she came back, he wanted it to be given to him, while it was so hot it could not be drunk. His friend, Mr. Goodwin, tasted it once or twice to ascertain if it was cool enough, taking about a teaspoonful each time, and he then very distinctly perceived that it was *quite sweet*. He held the bowl in one hand, and a lamp in the other, over Mr. Kinney, while Mr. Kinney was drinking the tea with great eagerness, but by little at a time, it was so hot, and he saw a whitish sediment rolling at the bottom, which the witness will describe very accurately as he saw it. Very soon after drinking this tea, Mr. Kinney grew much worse, and the physician came, and not suspecting arsenic had been taken thought the symptoms exhibited were those of Asiatic cholera. About ten of the clock next morning, Sunday, the 9th, Mr. Kinney died sitting in a chair, with his feet upon the edge of the bed. The gentleman who tasted the sage tea, after watching all night, retired about day-light and went home to bed but could not get to sleep, was affected with nausea, disposition to vomit, restlessness, uneasiness at the stomach, and believes all these consequences were produced by the small quantity of the tea he took.

The doctor who came to Mr. Kinney a little after midnight of Saturday was Dr. D. H. Storer, who was not the family physician, but was the first one the messenger could find. Mrs. Kinney made afterwards a strange apology to Dr. Snow on this subject.

I shall not attempt to sketch the medical testimony to you, as I have never heard it, and the eminent physicians will give it to you in person in an intelligent, very minute and very correct manner. But it may be useful to describe to you the now well known effects of white arsenic, after it is taken into the human body in quantities of ten grains or more. Nausea and faintness are experienced, which are soon succeeded by a burning pain in the stomach and obstinate vomiting. The matter discharged exhibits a yellowish green, and after some time is tinged with blood. A sensation of dryness, heat and tightness is experienced in the throat, with unextinguishable thirst. The voice is hoarse, and articulation of words difficult. Diarrhoea sets in, with irritation. The abdomen is tense and painful, and the irritation extends to the urinary passage, accompanied by a pain in the bladder and swelling and gangrene in the genital organs. The heart flutters, the pulse is small, the surface cold, the extremities livid, the countenance collapsed, and the tongue and mouth furred.

These are at the present day well ascertained to be the common consequences of arsenical poison in the human system. During the present century learned men have devoted much time to Toxicology, and their knowledge is extensive and accurate, and has often been relied upon with entire confidence in courts of justice. You will have such scientific witnesses before you, and this part of the case will be made very clear.

To the inquiries of Dr. Storer, when he first arrived, Mrs. Kinney gave the answers, and so far as proper or recollected by the wit-

ness, they will be detailed to you. She mentioned the fact of his taking the pills, exhibited some of the same kind, asked Dr. Storer to examine them, and inquired if they would produce vomiting and the other symptoms then exhibited by her husband. Dr. Storer broke one of the pills open, tasted it, ascertained its ingredients, and thought it would not produce the vomiting, collapse, and general symptoms of the patient. Dr. Storer prescribed mustard poultices to the pit of the stomach and to the feet, forty drops of laudanum, and an opiate injection, and departed. He was called again four or five hours afterwards, being then about six o'clock Sunday morning. Mr. Kinney was much worse; such effects as I have described as the consequences of arsenic had all along been very manifest, but poison not being suspected, he was supposed to have the Asiatic Cholera.

He suffered excessive pain, and died between ten and eleven of the clock of that Sunday forenoon. Dr. Storer saw nothing extraordinary in the wife's conduct during all the time before her husband died, with the single exception that she said she could not give him the opiate injection. Dr. Bigelow was called in, about half an hour before Mr. Kinney died. On the same day, Dr. Storer told the prisoner it was desirable her husband's body should be examined; she made no objection to the *post-mortem* examination, and that examination took place on that same Sunday afternoon. The manner, progress, discoveries and results of the examination, will be very explicitly and minutely detailed in the evidence of the learned chemists and doctors who will be called as witnesses.—*Arsenic was clearly developed.* They did not tell Mrs. Kinney so then; but on Monday or Tuesday after Mr. Kinney's decease, she sent for Dr. Storer and said she wished to unbosom herself to him, and had an hour's conversation, I must say a most extraordinary one, giving a long history of her acquaintance with Mr. Kinney, and finally asked the doctor *for a certificate that he died of Cholera.* There are many very extraordinary passages in that conversation, and your critical attention will be called to it.—Though Dr. Storer had not suggested the idea to her that her husband had been poisoned, and does not know that any one else had suggested it to her, she told him *at that time* that there were a great many stories about, and, among the rest, that she had poisoned Mr. Kinney. She then said the people at the funeral kept pointing her out, and saying, *"there she is,—there is the woman who poisoned her husband."* She expressed no grief, shed no tear. She wished the certificate of the doctor, as she said, in consequence of the reports, and as she was going, as she said, to visit his friends. Not getting a certificate, she afterwards in a day or two sent Miss Collins to Dr. Storer for one, but he of course, gave none. On the next Sunday morning, the 16th of August, a week after Mr. Kinney's death, Dr. Storer and Dr. J. B. S. Jackson called on her, and reported to her, for the first time, that arsenic *undoubtedly and certainly* was the cause of his death. *She then shed no tears, expressed no surprise, shew no emotion; only said, INDEED!* Dr. Storer then asked her if she thought

he had taken it himself? She said, "*No, George would never have taken it himself!*" After a few minutes the doctors left her. Her subsequent conversations on that Sunday morning are very remarkable.

The contents of Mr. Kinney's stomach were analysed by Dr. Martin Gay; the post-mortem examination was made by Drs. Bigelow, Storer, and J. B. S. Jackson.

Further accounts of the last hours of Mr. Kinney, and of his symptoms and sufferings will be given you by William F. Goodwin, Mary T. Smith, Lucretia Bears, and Elmira W. Collins; and Miss Collins will also relate to you many particulars in the conversations and conduct of the prisoner *before* and *after* the death of Mr. Kinney, and during the two last days of his life; conduct and conversations, from which I think you will draw most important inferences in the close of this interesting trial, when they are considered in connection with a great many other parts of the testimony. Much of the circumstantial evidence of her guilt will be derived from those sources. Mrs. Kinney had living with her a daughter named Dorcas Freeman, about twelve years old. On Wednesday after Mr. Kinney's death, she was sent to Vermont. On Thursday morning, the next day, some unusual occurrences took place before and at breakfast in Mrs. Kinney's house. They will be related to you by Hannah Varney, and by Miss Collins. Mrs. Kinney, (a very unusual circumstance) herself prepared some apple-sauce for that breakfast, and the persons who sat down to breakfast were Hannah Varney and her little son, Miss Collins and Mrs. Kinney—Dorcas had been sent away. All of them were taken sick, and vomited not long after breakfast, except Mrs. Kinney, who also complained of being sick, *but I believe nobody saw her vomit*, or saw her sick in any way. Hannah Varney went after breakfast into the sink room, and looking for some papers to kindle the fire, found one piece of paper, among a parcel of waste papers there, on which was written the word *poison*. That paper and these Thursday morning events, will open much discussion before you, and probably will be much commented upon by the learned counsel who address you upon the evidence in the case. There were also cucumbers and warm bread on the breakfast table, as well as the apple-sauce, but the apple-sauce was the uncommon and now very suspicious article on that table.

It was the Sunday morning, a week after Mr. Kinney's death, that Doctors Storer and Jackson called and informed the prisoner of the arsenic found in her husband's body. Her extraordinary conduct and conversations on that Sunday after the Doctors left her, will be related in Miss Collin's testimony, who was her friend, and slept with her after Mr. K's death, and had many other conversations with the prisoner, which it is supposed will much influence your decision upon several of the important questions now to be decided. On Friday of that week, that is, about twelve days after the funeral of Mr. Kinney, who was buried with military honors on

Monday, the tenth day of August, the prisoner left Boston, and went to Thetford, in Vermont by the way of Lowell. This was a few days *before* the Coroner's inquest was taken. The public journals teemed with allusions to Mr. K's death, and the Coroners seemed *compelled* by public opinion to institute an inquest.

The conduct and conversations of the prisoner at Thetford, her inconsistency and contradictions, we think, were very extraordinary, and we shall ask your careful attention to them when Mrs. Harriet Hosford and Mrs. Frances Kendrick are under examination. They will probably be relied upon by the Attorney General as indications of guilt, and the learned counsel for the prisoner will endeavor to explain them as not inconsistent with the hypothesis of her innocence. The absence of ordinary grief, the change in her conduct, conversations and representations of the character of Mr. K.; her *denial* and *subsequent* charge of his having committed suicide, and many other things are truly astonishing. Upon the subject of the procurement of the arsenic, some evidence will be offered to you, but not perhaps of a very satisfactory nature.

Upon the question whether Mr. Kinney committed suicide, we shall offer you the testimony of Mr. John Barnes, his most intimate friend and foreman, who will detail facts and circumstances which will have a tendency to disprove that supposition or charge. Evidence upon this point will also come from various other sources, as well as the prisoner's own declarations.

In the course of the trial many incidents and other circumstances will be proved, too numerous now to be recapitulated, but of sufficient importance to be put into the scale of evidence. Should you arrive at the conclusion that the arsenic was administered to Mr. Kinney by his wife, I believe it will not be contended on the other side that it was given to him through any *accident* or mistake. I have never yet heard that suggestion made. If administered by premeditated design and it caused his death, the offence is *murder* as charged in the indictment, and it cannot be reduced to Manslaughter or any lesser offence.

As to the existence of any motive that could prompt so horrible an act of domestic atrocity, it is not necessary that the Government should be able to prove one. Motives to crime are frequently inscrutable. The secrets of the heart, when wickedness is contemplated, are seldom divulged. We can *conjecture* motives, but generally are unable to *prove* them. The tongue of the victim is sealed in death, and cannot tell us of motives. Perhaps in the course of the evidence, a motive will appear. You only are to be the final judges on this point, and I shall leave it wholly to your sagacity and intelligence to discover it. If the evidence satisfies you a foul murder has been committed, you certainly will not acquit the culprit, merely because you cannot see an adequate motive for the commission of such a detestable crime. In the history of the parties and of their domestic feelings, a thousand extraneous circumstances, known only to them, the change of feelings, jealousies, resentments,

hopes, fears, &c., produce results, the causes of which are incapable of judicial proof. I now gentlemen, proceed to the evidence, and will call the witnesses before you.

THE WITNESSES FOR THE COMMONWEALTH.

Dr. D. H. Storer: Was called to see Mr. George T. Kinney on 9th of August last, between twelve and one in the morning. He appeared to be in great suffering, complaining of severe pain in the stomach and bowels. Mrs. Kinney told me he had been unwell a week or ten days. He had lately had an attack of varioloid but he had attended to his business until the noon of the day before. Said he had applied to Dr. Harrington during his sickness and showed me pills or powders he had had of him. Broke open the pills; supposed them to be cayenne pepper; the powders supposed to be Dover powders, a preparation of opium. Told her I did not suppose the pills or powders could have caused the sickness. I prescribed a poultice, 40 drops of laudanum to be taken and also an injection with 60 drops of laudanum. Was called again between five and six in the morning; found him a great deal worse; very thirsty, asking for drink and vomiting as soon as he drank. Discharges thick, tinged with bile; found the laudanum given by the mouth, but not the injection. Mrs. Kinney said she could not give it; told her it was important and I also prescribed a pill of calomel and opium. Mr. Goodwin was present. Went home and went to bed. Saw Mr. Kinney again between nine and ten that morning. Found him in great agony. The pill had been given and he had ceased vomiting. The

injection had not been given. Took his wife aside and told her her husband's symptoms were very similar to those of the Asiatic cholera in 1832 and I proposed to call in Dr. Bigelow. I went out and met Dr. Bigelow who returned with me. We prescribed nothing as he was past remedy and dying. Dr. Bigelow agreed with me that it was a case of malignant cholera. Saw Mrs. Kinney and told her it was very desirable there should be a post mortem. Said she had no objection except the natural feeling of all persons on such occasions. Dr. Jackson performed the operation; he suspected the trouble was produced by some irritating poison. Was governed by Dr. Jackson's opinion. Have no doubt now it was poison.

Told Mrs. Kinney that many of the appearances were such as we had noticed in cases of cholera. Did not tell her he had died of poison. She said George had been unwell for several days, and he had suddenly died from some cause, as unknown probably to you as it is to me. Mr. Kinney died on Monday. On Tuesday had a line from Mrs. Kinney to call. No other person was present. She said she was desirous I should give her a certificate that her husband died of cholera. She began by saying she wished to unbosom herself to me. She then gave a long history of her former loves. She said that for the most part she and Mr. Kinney had lived happily together, that he

was irritable but always ready to acknowledge his faults. She said it was very unpleasant to him for her to receive visitors from clergymen.

She said it was currently reported that she had poisoned her husband and said I must be aware of the reports against her. —Up to that time I had not said a word about poisoning to her, nor had any one in my presence. She said there was a very large funeral and she was pointed out as a murderer. She was perfectly calm and composed. No tears. She said that she intended to visit his friends, where they were going before he was taken sick, and it was important to have the certificate to show them. Told her I was not satisfied as to the cause of his death, and could not give the certificate. On Thursday after, Miss Collins called for the certificate. Told her I was not satisfied as to the cause of his death and could not give it. Dr. Jackson called on Mrs. Kinney with me on the Sunday after his death.

I then told her we had ascertained by chemical analysis, that arsenic was found in Mr. Kinney's stomach and that was undoubtedly the cause of his death. —She merely said, *indeed!* No grief. That noon Miss Collins called with a request I would visit Mrs. Kinney. I went after church. She said she could not imagine how the arsenic was in the stomach. Her principal object seemed to be to know who knew we had found arsenic. I told her Dr. Martin Gay who had analyzed it, and also Dr. Hildreth knew it. She said she would rather have given the world than Dr. Hildreth should have known it. I

said, "Mrs. Kinney, it is possible your husband might have taken it himself." She said, "No, George would never have done it." She said that Dr. Hildreth was very inimical to her. He belonged to a religious society, and he and they were inimical to her and would glory in seeing her injured. I have no doubt he died from arsenic. The poison being found in the stomach settled the question. Did not see Mr. Goodwin taste the tea that Mr. Kinney drank the second time I called. Mr. Goodwin said it was too hot I think. I saw Mr. Kinney drink the tea and as he drank he vomited. I did not examine the vessel in which the tea was. Mr. Goodwin gave him the tea to drink.

Mrs. Kinney said there was something very mysterious in her husband's conduct, the evening before his death. She said a Dr. Bachelder had visited him that evening and they were left alone and the door fastened. She intimated that Mr. Kinney might be diseased, have the venereal, and asked me if it was customary for physicians to be locked up with their patients, except in such cases. Never heard of Dr. Bachelder. No such one belongs to our Medical Association. There are no appearances of the disease (venereal) on the post mortem examination.

Dr. J. B. S. Jackson: Was at the post mortem examination with Drs. Storer, Bigelow, and a medical student and Mr. Goodwin. I performed the dissection. Was told it as a case of cholera, by Dr. Storer, and examined the body with reference to that disease. On opening the stomach found a remarkable appearance,

which led me at once to suspect the presence of arsenic, and that the man died from its effects.

Dr. Martin Gay: Sunday, August 9, received a bottle from Dr. Jackson, containing the supposed contents of the stomach of the deceased. Made a chemical analysis. Know it was arsenic as thoroughly as the blacksmith knew he was hammering iron, and with more certainty. I know there was arsenic contained in the contents of that stomach as it came to me; there is no possibility of a doubt; as to the quantity cannot tell.

Dr. Calvin Bachelder: A lady called Saturday night at the office and wished me to go to see a Mr. Kinney to whom I had given some medicine previous. The lady I did not know then; now I know it was the prisoner. Said he was not so well as when I saw him before, and he wished me to come and see him. I went to the house in Broomfield street with her. She said, "there is the man and you have given him medicine and know for what." It was the same man I saw on Tuesday. He had then called at Dr. Harrington's office. He told me he had been afflicted with the venereal disease—that it had troubled him more than usual and he wished to get rid of it. I examined and prescribed for him. The secondary symptoms were apparent, the first having passed away. Gave him five or six cathartic pills—a box of blue pills—there was no arsenic in the cathartic pills. Do not know who made them. The blue pills knew the components of—mercury, etc., but no arsenic. At the house I asked him if he had taken the pills as I pre-

scribed and he said he had. Was alone with him five minutes. The door was not locked by me nor any one to my knowledge. Did not request Mrs. Kinney to leave us alone.

I prescribed for what I supposed to be a case of cholera morbus. The remedy was of vegetable substances, the Dover's pills etc., but nothing containing arsenic.

Cross-examined: As I was going she asked me if I thought he would get well; she feared he would not. I told her I thought he would. She replied she had lost a former husband and some other relatives in the same way. I told her if that was the case she had reason to fear. The cathartic pills were made by Dr. Harrington. Saturday evening I gave him a bowel pill. This is a pill of my own manufacture, composed of musilage and cayenne pepper. Never asked by Dr. Harrington what it was composed of. Have no connexion with Dr. Harrington except the time I kept his shop. I gave the deceased no other medicine than I have described, except some drops of laudanum. Never used any arsenic in medicine in my life. Never stated to any person that I had been in the habit of using it.

William F. Goodwin: Was acquainted with him and his wife before they were married. Mrs. Kinney on Saturday noon said George was very sick and asked me if I would go and see him. I went. He appeared sick and in distress. Did not see him again until about nine o'clock that evening. Mrs. Kinney's little daughter came with a request from her mother that I would come over.

I remained in the parlor below at Mrs. Kinney's request until nearly eleven. Mrs. Kinney came down and said Mr. Kinney wished me to go for a doctor and wished to see me. Kinney said he wanted me to go for Dr. Ware. Advised him to send for a doctor nearer. I then went to Dr. Storer and he went over with me. It was between twelve and one. Went out to the apothecary's and got laudanum prescribed by Dr. Storer. When I returned the doctor had gone. I remained till five in the morning. Toward the morning I proposed some tea to relieve his thirst. Asked Mrs. Kinney and she said there was no cold tea. He asked her to make some—he thought it would do him good. She said she had some sage in the house and I asked her to make that

She was lying on the bed then—got up—as she was going out he said Hannah don't sweeten it. Was absent about twenty-five minutes, and came back with a pint bowl of tea. She sat it on the bureau—complained of headache, and laid down again. Found it too hot to drink—I tasted it awhile, stirring it with a spoon, to see if it was cool. In five minutes Mr. Kinney drank it. She held the bowl. Then sat it on the bureau and laid down. In fifteen minutes he called for drink again. I gave it to him, and he drank the remainder. Saw in the bottom of the bowl a sediment of a light color as he was drinking. It was white, and appeared to adhere to the bowl. He drank all the tea. Did not notice the bowl afterwards. Mr. Kinney said he could not live long unless he got help. Sup-

posed it was cholera morbus. I was so informed by Dr. Storer. Mrs. Kinney staid in the room all night. I did not sleep during the night. Felt unwell before I went home.

After I got home felt very sick, like vomiting. I went over to Mr. Kinney again toward ten o'clock. He was in the chair, did not speak. Remained till he died. There was a great change since I had left him. He looked death-like. When I saw him before he expressed great anxiety to get relief. Said if he could relieve the sensation in his stomach he should be better. He was a hose and trunk manufacturer. A few days previous he told me his business was very good; he had got a good job. Saw the stomach taken out and the contents put in a bottle. Got the bottle and rinsed it out before the contents were put in. It was carried away by the doctors. When I first saw Mr. Kinney his wife said he had had the varioloid. The family consisted of Mr. and Mrs. Kinney and her daughter—eleven or twelve years old. Do not recollect whether it was on Monday or Tuesday that I first heard the report that Mr. Kinney had been poisoned. Got the bottle at my boarding house.

Cross-examined: At the examination before the coroner do not recollect I stated anything as to the sediment in the bowl. Knew of Mrs. Kinney's intention to go out of town after her husband's death. I spoke for her passage and paid the fare. She was going to Thetford to see her husband's friends. She had made previous arrangements to go before her husband's death. When I went out to get the laudanum

I was not told to get an injection pipe by Dr. Storer or any one. First learned he was poisoned by calling on Dr. Storer. Had heard all the rumors previous but did not believe them.

Dec. 22.

John Barnes: Was the foreman of the deceased. Mr. Kinney had been unwell for some time before his death. Did not know of the deceased having the particular disease testified to by Dr. Bachelder. Had never discovered any melancholy temper in the deceased. He had been in pecuniary embarrassments but took it very easy. He had a good job to do previous to his death. Never heard him say he was tired of life.

Hannah Varney: Mrs. Kinney said she was going into the country the next Wednesday and Mr. Kinney was sick and she would like to have me come on Sunday or early Monday as she should have a great deal to do to get ready. I went on Sunday. Mr. Kinney was alive; he was in his chair. Remained there till Thursday after his death. Went away then, returned on Friday and went away Saturday. Saw but little of Mrs. Kinney and had but little conversation with her. On Sunday washed the dishes. Know nothing of the bowl that contained the sage tea. The family consisted of Mrs. Kinney and her daughter, Miss Collins and myself and my little boy at the time of Mr. Kinney's death. - On Thursday morning after his death Mrs. Kinney made some apple sauce for breakfast. Between nine and ten I began to feel unwell. After ten Miss Collins came from the shop and said she felt dreadful, I told

her I had felt so half an hour. She vomited. I soon did so twice myself. Felt great distress and thirst and weakness of the whole system. While in the kitchen that morning collecting papers to kindle the fire, a blue paper marked poison attracted my attention. The word "poison" was on it. It lay on the floor at the end of the sink. The apple sauce was in the sink room, the place in which I found the blue paper. On Thursday Mrs. Kinney advised me to go to a physician. The blue paper has the same general appearance as when found. The creases showed more plainly.

Lucretia Beers: Lived in Mrs. Kinney's house. Saw Mr. Kinney Sunday morning in the sick chamber. Said to Mrs. Kinney that her husband was very sick. She said yes, she did not think he would live half an hour. After his death I asked Mrs. Kinney what he died of, cholera or cholera morbus? Mrs. Kinney said folks must be crazy, must be beside themselves. It was neither, it was the bowel complaint.

Chester Brigham: Saw Mr. Kinney on Saturday before his death. Spoke of great pain, and said he could not stand it long if he did not get relief. Asked him what the matter was. He said he was confident it was the cholera morbus. Asked him if he had not been eating something to produce it. Said he had not. He had been very particular what he ate for a week. Mrs. Kinney asked me to go for a doctor. She named Dr. Storer. I went and returned with him for a part of the way. I then went home. Next saw Mr. Kinney on Sunday morning. Mrs. Kinney sent for me. Was requested by

her to go to the apothecary's and get some pills. I did, carried them to the house in a paper. Saw Mr. Kinney again after this at ten. He was very weak. I left before he died. Did not see him again.

Mrs. Harriet Bingham: Saw Mrs. Kinney on Saturday before he died. She told me her husband was sick and kept vomiting and was faint and she did not know what to do for him and she asked me. I asked if she had a doctor, she said no. Told her sage tea was very good. Saw her at eight o'clock. She said George was worse, she feared he could not live. Saw her the day her husband died. She appeared much affected. Said she had all her life been afflicted with sudden deaths. That she knew George would not live and he had died for all the world like Mr. Freeman. Saw her the day after the funeral. She had attended. It was a military funeral. Her conversation was principally, how strange it was that one and another was so suddenly taken from her. She said George was a fine husband and treated her well. Again saw her on Thursday afternoon at her house. Heard that they were all sick. She said they were. She said she did not know what it was, but the bread was very strong of saleratus—so strong that it was red. She tried to vomit. She said they had eaten cucumbers, mentioned in particular the sour milk. Said that she had a physician, Miss Collins one and she another.

Thomas G. Bradford: In August last with Charles Mead, an apothecary, tended his shop. A lady called in the afternoon and

asked what the article was we sold to kill rats with. Told her arsenic. Asked how much it would take. I told her not a great deal. She said she would have three cents' worth, a quarter of an ounce, 120 grains. I put it into two wrappers of papers and wrote on the outside "poison." Recollect both wrappers were of the same color. We never use white wrapping paper, used to use all colors. I told her we did not usually sell arsenic without a recipe from a physician. Mr. Meade was out. The lady was about five and thirty should think. Small size. Never saw her before. I sold arsenic at another time in the forenoon to a lady, marked it in the same way. Don't recollect selling arsenic to any other persons. Did not notice the lady who bought the three cents' worth — cannot say it was the prisoner, Mrs. Kinney. Think I should recognize my handwriting then; it has changed since.

The blue paper is shown to the witness with the word "poison".

Witness: I did not write that—I am certain of it. There is no general resemblance to my handwriting.

Elizabeth B. Linnell: Worked at Mrs. Kinney's, at the shop. On Saturday between three and four o'clock saw Mrs. Kinney. She said her husband was very sick, she feared he would not live. She said Mr. Freeman and Mr. Freeman's father had died in a similar way. Next saw her on Monday at her house. Asked her the cause of her husband's death. She said cholera morbus. I said she was wonderfully supported. She replied yes, she had every-

thing to comfort her, as he had his reason to the last. She spoke of her deceased husband very highly. On Friday I went to her house. I had then heard of the report of the poisoning. I had told it to Miss Collins. It made her faint. Mrs. Kinney came to the shop in the afternoon of that day. I told her what I had heard about Mr. Kinney being poisoned. She was composed and wished me to tell her all. I told her it was reported that she had poisoned Mr. Kinney. She wished to know who made the report. I could not tell her. She wished to know if the young ladies knew it in the shop, or if I had told it to Miss Collins. She wished me to go for Dr. Storer. She said, "they accused me of poisoning Mr. Freeman to get Mr. Kinney; and now they accuse me of poisoning him. Who am I to get now?"

I told her if she was innocent she could look to God who knew it. She said, "yes, that was her only support and as God was her judge she was innocent." She wished me to say nothing of it. After the funeral I was making a dress which she was to wear to church on Sunday. She said she hoped it would be sanctified to her. She said she had many enemies and that Mr. Freeman's friends would like to see her hung, she had done so well. She spoke of her husband as a kind husband. Saw her the next Monday. She told me she did not wish to say anything about the reports. When she left the city she gave up the dress-making to me, for my benefit.

Cross-examined: First heard the report on Wednesday, communicated it to her Friday after-

noon and then went for Dr. Storer. Carried a verbal message to him that Mrs. Kinney wished to see him. I think it must have been on Wednesday that I first heard the report of the poisoning. Cannot tell which day it was positively. I now think it was on Thursday afternoon, from some work we had in the shop.

Dr. Asa B. Snow: A week after his death I received a message from Mrs. Kinney. Found Mrs. Kinney and Miss Collins both sick, similar in their sickness, but Miss Collins the sickest. They had been vomiting. I had seen Mrs. Kinney the Saturday previous in the street. She said her husband was sick and if he did not get better she would send for me. I was not sent for. On Thursday she explained that she should have sent for me but that her husband had previously spoken for Dr. Storer. Cannot give her language, only my impression that her husband wished to have Dr. Storer. She spoke of cholera morbus and of her former husband dying very suddenly. Mrs. Kinney and Miss Collins told me what they had eaten for breakfast. In my opinion the food they had taken and irregularity of habit from being in a house of mourning, were sufficient to account for all the symptoms I saw. Had a conversation with Mr. Goodwin after Mr. Kinney's death. He said nothing of having been made sick by the tea. I heard it from rumor. After the coroner's inquest I saw Mr. Goodwin and he then mentioned his sickness.

Almira W. Collins: Went to assist Mrs. Kinney the 6th of August in her business in the

shop. Went to her house; was at dinner on Friday. Was then introduced to Mr. Kinney. They appeared very pleasant. About ten o'clock Saturday Mrs. Kinney said her husband was very sick at the store. Was in the parlor when he came in and went upstairs. At tea asked if she was going to have a doctor. Mrs. Kinney said she was going after one. Mr. Goodwin came at nine or ten o'clock. Mr. Kinney vomited and was distressed; he was evidently growing worse in the evening. She said she feared he would die in half an hour. When Doctors Bigelow and Storer came in we understood that it was the cholera. In the morning I was told he was dying. I was surprised, for I had no idea of it. We were called in to prayers; it was an agonizing scene; during the prayer he was panting for breath. Slept with Mrs. Kinney on Sunday night. No particular conversation occurred that night.

Tuesday morning Mrs. Kinney wished me to go to the graveyard to visit the tomb. It appeared to be out of affection for him. We went from the graveyard to the store. She there wept. She then went to make some purchases for her daughter who was going to Vermont and returned to the house to breakfast. Wednesday morning her daughter Dorcas went to Vermont. In all she said to me I understood she had lived happily with Mr. Kinney. Up to Wednesday after his death I had heard nothing of poison. Supposed he had died of cholera. Ate breakfast at Mrs. Kinney's on Thursday morning. Ate a small cake and applesauce. Soon after breakfast I was taken sick; felt

as if taken sea-sick. Mrs. Kinney said she felt bad and sick herself; appeared pale.

First learned the suspicion that Mr. Kinney had died by poison on Friday from Miss Linnell. I told her to say nothing of it and I would tell Mrs. Kinney at a proper time. As she was going out I told her I had something to communicate and I was then surprised to see Dr. Storer come in and I left the room. I afterwards learned she was aware of the report, Miss Linnell having told her. Saturday night she wished me to go to Dr. Storer and ask him for a certificate that Mr. Kinney died of cholera. She wished it in consequence of the reports; this was after had told her. I went to Dr. Storer and made the request; he declined.

At the examination by Doctors Bigelow and Jackson, I said to her, after they were gone, that she had had an early call. She replied, "oh, yes, Dr. Jackson was going to the hospital, and had stopped to make some examination about the cholera;" she eat her breakfast and appeared composed; she never told me what the doctors said; that afternoon I carried a note from Mrs. Kinney to Dr. Storer; he read it and said he presumed I knew that Mr. Kinney had died of poison. This was the first I knew of the discovery made by the doctor; when I returned I related it to her, she was greatly affected, and said, "Oh that God would make known the mystery why George had done it; why he would not disclose the secret cause;" she appeared agonized; I expressed surprise that he should have died so calmly and

called on God for mercy, when he was his own murderer; she said it was one of his dark, deep designs; she said, "I never told you that George got high;" I asked her why they had not searched for arsenic; she said they had found pills; she said there were vials and medicines in his drawers, which he was in the habit of using; intimated for a particular purpose; she described him as noble and generous; I asked why she married him; she said at one time out of pity; and at another, to get rid of him; she expressed surprise that he should have taken poison, said she could not believe it, and the Doctors must be mistaken; she said she asked him, on the Saturday he was on the bed, what he had been taking; he replied only a glass of wine; she said you promised not to take any more, and he replied it would be his last; before she went to Vermont she said she should not be surprised if she was arrested, as she had so many church enemies, who would be glad to see her hung.

Harriet Hosford: Am a niece of deceased; was at the house the Sunday he died in the afternoon. Mrs. Kinney conversed about having lost friends by sudden death; spoke kindly of her husband. She said: "You saw your uncle as he was the other evening and I don't know but he was taken in mercy; no one knows how much I have suffered the last summer." She seemed to wish me to understand he was intoxicated. I never thought him dissipated. On Wednesday I went to my home at Thetford, Vermont. Mrs. Kinney's daughter went with me. Met prisoner at Thetford soon after she arrived

there at the house of my father. She appeared much affected and shed many tears. She conversed with me about her husband; said he had become very dissipated and had acquired a habit of gambling. That his conduct was the cause of her children's leaving. She said nothing of the reports of the poisoning of her husband till the next evening; she then communicated them. She was at my father's when the officers arrived on Saturday. She was taken there and conveyed to the public house. She conversed freely about returning to Boston.

Cross-examined: Heard the officer communicate the object of his visit. She was calm and collected.

Dr. Charles Mead: Keep an apothecary's shop. Young Bradford is in my employ. Have not ascertained to whom I sold poison in August. I sent a notice to several clergymen last Sunday and requested them to read it from the pulpit. Dr. Hildreth called at my store, and wished me to state if I had sold arsenic to any woman; my lad, Bradford, was then in Maine. When he came home I inquired of him, and he told me had sold some poison to a lady; I have never been able to ascertain who it was.

Cross-examined: Sent the notice to the clergymen in consequence of the Attorney General having requested me to take every means to ascertain to whom I sold the poison.

December 23.

William F. Goodwin: After the apprehension of Mrs. Kinney saw her at the house of Mr. Adams, the constable. She said that if it had not been for my testimony

and Miss Collins' she should not have been in that situation. I replied it was unkind of her to think so, for I was summoned before the coroner and obliged to tell what I knew. I did it very reluctantly. Asked her to explain some circumstances. She then said Mr. Kinney poisoned himself. I told her I could not believe it. Asked her what reason she could assign and she told me that he had stated to her that he would make way with himself if he ever got the disease which he then had. That he said rather that anybody should know it he would make way with himself. I remarked that I did not think that he had that disease. She said he had.

Cross-examined: Am a house painter. Use artists' colors in my business. Have king's yellow in the shop. Seldom use it. On reflection we have no king's yellow in the shop.

Dr. Storer: Was called by Mr. Goodwin to visit Mr. Kinney, in the morning, and I supposed until yesterday, that the same man who called me first, called me the second time. When I was

there tea was administered, I supposed while Mr. Goodwin was present, but it now appears it was not he; I supposed so until he told me to the contrary. A man was present when I was there to see Mr. Kinney; and tea was administered by that person. Mrs. Kinney was on the bed. She did not hand the tea to Mr. Kinney while I was there. When the poisoning was suspected, recollect Mr. Goodwin wringing his hands and saying he was individually the cause of Mr. Kinney's death, by giving him the tea. Asked if it was Miss Collins who called both times for the certificate as to Mr. Kinney's death, says he thought so when testifying before, supposed it was the same individual, but now understands it was not,—that Miss Collins called but once, with a note.

Miss Harriet Hosford (recalled): At the time I expressed my surprise that Mr. Kinney should have died so calm and composed if he had committed suicide. Mrs. Kinney told me that he had exclaimed, "O God, I have killed myself."

Mr. Curtis said that he had not heard anything in the opening of the case on the part of the Government which indicated to what point the evidence concerning the sickness of the family on Thursday would be urged, or what inference would be drawn from it. He now wished to hear some statement from the counsel for the Government of the points to which that evidence would be directed.

MR. SHAW, C. J. (after consulting with the other Judges): We cannot now pass any general order on the subject of the evidence. If the prisoner's counsel wished to exclude the evidence, the point could have been raised when the witnesses were called.

Mr. Curtis: My object has not been to exclude the evidence, although we think that we might have embarrassed its introduction. I merely wish to know how it is to be urged as tending to prove the guilt of the prisoner. The Court having intimated that it cannot pass any order on the subject, I will ask the counsel for the

Government to state to us the point to which they intend to use that evidence.

Mr. Austin: I do not feel called upon to make any statement.

MR. CURTIS' OPENING FOR THE DEFENSE.

Mr. Curtis: Gentlemen of the Jury: The drama of suspicion has reached one of its stages and the victim of popular prejudice and delusion is, it may be hoped, one step nearer to a deliverance.

This most interesting and important case is now to be opened on behalf of the prisoner. You will probably have anticipated that I should call your attention to some of the general features of the case, before I proceed to state the substance of the defence. First of all then, I feel that it is not improper for me to state to you how my learned friend and myself, instead of other gentlemen, who have from time to time been reported as of counsel for Mrs. Kinney, should appear in her defence. You have doubtless seen it stated in the newspapers, that different gentlemen of eminence at this bar have been applied to, to act as her senior counsel; and you are now aware that her defence is in other hands. My Colleague and myself have felt that among the causes of prejudice which have seemed to be accumulating upon this unhappy person, one of the most serious was the impression that might be derived from the fact which I have just stated—that learned and eminent persons had, on learning something of the case, declined to embark on it. Gentlemen, I have a right, and it is my duty to say that this is not the fact. No person at this bar, who has been applied to by this defendant, has been so wanting in the true spirit of humanity, or in the true sentiment of professional duty. But the time, the exertions and efforts of counsel engaged in large practice, are not their own. They belong to others; and a violent departure from the routine of engagements that may have been contracted, leads not only to much private inconvenience, but likewise to public injury, in deranging the business of the Courts. There was yet another reason. This unfortunate person did not possess the means of remunerating counsel: and the distinguished persons who were applied to, would not have been justified in deranging their previous engagements, without such remuneration as would enable them to command the services of others who could supply their places and perform their duties to their clients and the Court, which had been pre-engaged.

Under these circumstances Mrs. Kinney could only place herself in the hands of the Court.—There is an old and merciful fiction of the Law, by which the Judges are represented as the counsel of the accused; and founded upon this, as I understand it, is the practice of appointing counsel to conduct the defence, the Court delegating to them the labor of the cause, but still preserving, as we trust, its watchful guardianship over the rights of the accused. It was found,

on enquiry, that my learned friend could, at a sacrifice, undertake this defence; and along with him, I have been appointed to aid in presenting it to you.

The next topic to which I wish to advert is one anticipated by the opening counsel for the Government, but which will not be used as he anticipated. Allusions will certainly be made by both of us to the solemn and weighty responsibility which the consequences of your verdict throw upon you. But I beg you not to misunderstand those allusions. Neither of us are here to seek to fright you from the performance of a public duty. The awful result of a conviction under this indictment is the law of the land; and however you or I might wish to change that law, here there is but one duty, solemn, responsible, painful it may be, but yet a duty, to be performed manfully in the face of man, and relying on the mercy of God. I put away therefore all discussion of the right of human society thus to inflict the last dread evil, as a punishment. But I do not put away the final consequence itself. I keep it—I claim to keep it ever before you, as the great warning that shall rouse and sustain your minds to a religious care in the weighing of the evidence. I assert that in capital trials, the constant presence of the result of conviction is to the mind of the juror only that additional sanction, upon his oath, which the imperfection of human judgment needs. In the most common transactions in Courts of Justice, we appeal directly—as a motive and stimulus to the mind—to the Deity. God is invoked, that we may truly and impartially decide upon the evidence. But what a sanction, what a motive and stimulus ought to be here! *He* is not only invoked, in whose hands are the issues of life and death, but that eternity into which we may be about to dismiss one of his immortal creatures, is present to the mind. Do you not feel that, in the great task before you, such a thought is needed? When you took those seats, to enter upon this trial, did you not feel that some support to the conscience, some motive to more than ordinary care, was needed to carry you through this important duty, and prevent the sad result of regrets which might be too late?

There is yet another topic to which I feel it my duty to advert. You know that for months, the very atmosphere has been rife with rumors respecting this case and the history of the defendant. You know that insinuations and stories have accumulated upon this occurrence, shedding upon it a false and fatal light, which the eye of credulity has gazed at, as if demonstration itself had been produced. You know that subjects have been alluded to here, which it is necessary to exclude from the mind, in weighing this evidence. You will not feel, gentlemen, that in addressing myself to this part of the case—in *appealing* to your care upon these points, I do it from any want of confidence in your strictly conscientious discharge of duty. But the effort to which the mind is called, completely and faithfully to perform that duty, is serious and severe.

I know how hard it is to shut out all fore-knowledge, all sources

of testimony, all facts and surmises and conjecture, which are not drawn from what is legitimately before us in evidence. When a peculiar view is pressed upon the mind, and it is casting about for corroboration and support, so insidious is the operation of prejudice that it will sometimes unconsciously, and with purest intentions, seize that corroboration from sources which the public justice has declared shall not jeopardise a hair of the head of one accused.

Pardon me, gentlemen, if in alluding to this danger, I have spoken thus directly. I do indeed rejoice that the trial by Jury furnishes precisely that intelligent, *practical* state of mind—conversant in affairs and thoroughly knowing human nature—which constitutes the very best tribunal for the weighing of evidence. I rejoice too, that in this community, juries are daily gathered for the administration of justice, whom no accused person can doubt or fear. But, gentlemen, I had a duty to perform, in clearing the ground for this defence, which would not suffer me to approach you with the language of ordinary compliment by which to manifest my confidence in you. I feared when I commenced the investigation of the case fourteen days ago, that it might be one of those dark webs of circumstance in which the innocent are sometimes involved, for want of light. I trembled for the public justice—that it might be abused by making one hypothesis alone the object of its reflections and enquiries. I thought therefore, gentlemen, to speak to you in the fullness of my own anxiety, directly to that interior conscience which resides in all men, and by so speaking to make you feel that we bring this case to your decision with confidence in you and in the result.

The defendant, gentlemen of the jury, stands indicted for the murder of her husband by poison. It was said, in the opening, that the evidence the government would offer, was both positive and circumstantial. It is true, evidence has been given tending to show that arsenic was found in the stomach of the deceased, and that he died from that cause; but that this fact, if it be so, has any tendency to show that Hannah Kinney administered it, I appeal to your judgment. There is not a particle of direct evidence to show that the wife administered the poison, if indeed he died of that cause. There is circumstantial evidence, and nothing but circumstantial evidence in the whole case, as made out by the prosecution.

Let us look, then, at the proper definition of circumstantial evidence, before we proceed farther. An issue of fact is sought to be proved by circumstantial evidence, when, in the absence of direct proof of the principal fact, certain other facts are offered in evidence, from which the Jury are asked to infer the principal fact, which is intended to be established. Now this is at best an inferior species of evidence. It is inferior because it is only in the absence of direct proof that it can ever be resorted to. The law does not permit circumstantial evidence to be used when positive evidence can be produced. It is also inferior, because the common

sentiment of mankind, upon questions of momentous interest, leans in favor of direct proof.

It is very common for those who rely on circumstantial evidence, to represent it as capable of producing as high a degree of certainty as direct proof. I am not disposed to deny that it may sometimes satisfy the mind. I am also disposed not to deny that there is sometimes a necessity for resorting to it, and that its entire rejection would impair the administration of the Law. But I never will, for one, upon this or any other occasion, fail to surround it, to restrict it and hedge it in, with all the energy of which I am capable, with those checks and safeguards, under which alone it can be anything better than the merest tyranny of opinion, founded on conjecture. I have read those melancholy records of the pride of human judgment, referred to by the opening counsel, which disclose convictions of the innocent, proceeding from the neglect or oversight of some principle, simple, yet essential to the truth. I did not, as he anticipated, design to cite them here; but they are familiar to every professional reader, and I have always drawn from them far different conclusions from those of the learned counsel. I have always risen from their perusal, with a conviction that it is a duty which every lawyer owes to his race, to maintain a rigid philosophy of circumstantial evidence. It is not because the theory of evidence is not now better understood, than it was in the times when those cases occurred; nor is it because the understandings of jurors are now better cultivated—that those remarkable and painful errors remain forever important warnings to every generation. It is because the human mind, with all its cultivation and all its pride of knowledge, remains ever the same in its constitution, ever liable to the same mistakes, abuses and impositions, that we should never lose sight of those dark examples of error. It is too, because those very errors have illustrated and negatively established the principles, the oversight of which *constitutes* the error, that they should be made to stand out on the page of history, warnings to all coming time, of the immutable truth and soundness of the principles thus fatally neglected.

I ask your attention, then, to the principles which are to be applied to the examination of this evidence. And recurring to the definition which I have given of this kind of proof, I observe that the first great rule of circumstantial evidence is this.

1. That every one of the facts and circumstances from which you are asked to draw the main inference, must be proved to you beyond a reasonable doubt. If the basis is unsound, the superstructure cannot stand. If you are in doubt respecting the truth of any essential fact among those from which you are to draw the inference, you can never reach that inference. You cannot begin to take a step towards it.

Every one therefore of the facts and circumstances must be rigidly scrutinized. You must be satisfied of the truth of every one

of them, before you can allow it to have the smallest place in the chain of evidence, upon which the main inference depends.

It follows too, as a necessary corollary from this position, that each circumstance must be established by its own independent proof, tending directly to it. The idea of drawing an inference by the aid of that which is itself established by inference, never yet entered into any theory of evidence, and cannot bear the test of reason. You must be satisfied by the direct, positive testimony of credible witnesses, that each fact is proved, and the proof must tend directly to the fact. Thus to take an illustration from the case on trial. Goodwin, it is asserted, was made sick by the sage tea; the inference is that the tea contained arsenic. You must be satisfied beyond a reasonable doubt that he was made sick by that tea; and on his testimony alone. You cannot go to the other circumstances in the case to argue *to* this. Thus, you cannot go to the apparently inconsistent or guilty conduct or appearance of the prisoner, and argue that *she* probably poisoned the deceased, and thence that the tea was the vehicle, and thence that it made Goodwin sick, and after this process of deduction, give the fact of Goodwin's sickness a place in the chain of circumstances. His sickness, *caused by the tea*, must first be proved to you, beyond a reasonable doubt, as if there were nothing else in the case; and then you may place it among the other circumstances from which the main inference is to be drawn. In short, the Government must prove every single circumstance which they put forward, from which the conclusion is to be drawn, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual circumstance.

It follows also as another corollary, from the same position, that if any fact fails to be proved it weakens the force of all the rest, as a chain of proof. It is generally agreed by the best writers on evidence, that the force of a number of independent circumstances is increased by each addition, in something like a mathematical ratio. It is not convenient, in moral reasoning, to state such a ratio in numbers. But the numerical ratio of mathematical process is a convenient analogy, by which to illustrate the increase in the force of circumstantial proof.—Under this illustration, it is at once apparent, that if the addition of a single circumstance increases the force of all the rest, in a certain ratio, the subtraction of that circumstance weakens the force of all the rest in the same ratio.

The second rule to which I call your attention, is that all the facts and circumstances must be consistent with the hypothesis. If any one of them is inconsistent, the whole falls to the ground. Thus Goodwin tells you that the sage tea had a sweet taste; and the hypothesis is that it contained arsenic. Now you must not only be satisfied that the tea had a sweet taste, but also that it is consistent with the presence of arsenic to cause a sweet taste in the tea.—The fact upon this point is quite otherwise.—We shall show you that arsenic is not of a perceptibly sweet taste, or of any taste at all.

The third rule is, that the facts and circumstances must not only be of a conclusive tendency, but they must to a moral certainty actually exclude every other hypothesis. In other words, they must be shown to be not only consistent with the guilt of the prisoner, but inconsistent with her innocence. This is the grand, cardinal rule of circumstantial evidence, and under it, it must not only be proved to you that the deceased died of arsenic, and that it is consistent with all the facts to suppose that it was administered by his wife, but you must also be convinced that it could not have been given to him by accident or design, by some one else, or taken by his own act. You are to be satisfied that the manner of the death, and all the circumstances which the Government have put in evidence, are to a moral certainty inconsistent with any other supposition than that the deceased was murdered by his wife.

Here I have to state to you that the burthen of proof is not upon us. It is not for this wife, arraigned as I believe on the merest slanders of suspicion, to account for the death of that husband who went into Eternity at peace at least with her, however ill at ease he might have been with the world and himself. That death may be in the inscrutable knowledge of God, or locked in the bosoms of those who will not tell. It is not her duty to show you how it occurred. If it were, no human being could be safe under accusation, no administration of the law could be other than an engine of the purest and most unmitigated injustice and folly. The rule that I have stated, is the grand principle which prevents circumstantial evidence from working this monstrous wrong. It is the dictate of reason and the undeniable principle of law, that the circumstances should to a moral certainty exclude every hypothesis but that proposed. Here is the burthen upon the Government. They must bring you a train of circumstances which are rationally consistent with no other supposition, than that the poison was administered by the wife. Our duty, on the other hand, is not to prove—not to account—not to demonstrate the mode by which this death took place. We have only to suggest. We have only to show you that the fact of the death and the circumstances attending it, are consistent with *any one* of several other suppositions, and our task is ended, and neither you nor I will ever be visited with fears and misgivings that a horrible injustice has stained the annals of our law.

Hence, gentlemen, you will perceive the principle upon which this defence proceeds. It will consist in showing that the case made by the Government is utterly insufficient for a conviction; because it does not begin to exclude all other rational modes of accounting for this death. In other words, because it is not inconsistent with innocence. Here let me remark that it is not a balance of probabilities, between one and another mode that is to settle the question of guilt. That may or may not be the ground upon which public or private opinion proceeds to condemn or persecute. The victim may be pursued *into* the temple of justice, upon conjectures and proba-

bilities, but it cannot be immolated *here*, without a struggle, and without a more rigid satisfaction of the rules of law than any mere probabilities will afford. Here are those who will hold over her the protection of those great maxims of the law, which are established alike for the protection of the innocent and the detection of the guilty. Beyond all question, it is one of those maxims, upon which all such evidence rests, that the mere probability in favor of one hypothesis, as compared with the probability in favor of another, is of no sort of consequence, unless the circumstances adduced in support of it exclude, beyond a reasonable doubt, all other suppositions.

But, gentlemen, although a comparison of probabilities will not alone warrant a conviction, or indeed weigh at all in turning the scale in favor of guilt, yet it will and must add greatly to the strength and weight of argument, in favor of innocence, if we show you that the probabilities are vastly greater in favor of one or all of the hypothesis which we suggest, than they are in favor of that set up by the Government. The reason for this position is obvious. Nothing but circumstances of a conclusive tendency, which exclude all other rational suppositions, can ever convict: because they still leave room for reasonable doubt, inasmuch as some other supposition may be true, admitting all the facts proved. The probability of the story, therefore, is of no consequence, because if there be anything that may yet be the truth, notwithstanding all the facts, the mind cannot be satisfied beyond a reasonable doubt. But on the other hand, when you show that several other suppositions may be true, under all the facts, and that the amount of probability is vastly in favor of any one of them, you increase the doubts which the mind is compelled to entertain of the hypothesis first proposed.

This is important to be borne in mind, in this case, because here is a wife indicted for the murder of her husband.

Here I pray your attention to another principle of this defence, which I state in advance of any objections which may be urged. I am about to lay before you several modes, in which this death *might have* occurred; only one of these can be the absolute truth; yet it does not lie with the Government to say that this is an inconsistency on the part of the defendant. I will show you that it is a perfectly consistent defence; consistent with the rules of law and with the actual position in which the defendant is placed. I pray your Honors, with special attention to this point, to sanction the principle upon which in part I now base this defence, when the Jury shall come to be instructed.

The defendant is indicted for the murder of her husband, and the evidence is purely circumstantial. Now, in *the first place*, the burthen of proof is not upon her. The Government must prove to the full satisfaction of every mind upon your panel, beyond a reasonable doubt, that the hypothesis which they set up is not only consistent with guilt, but that it is inconsistent with innocence. In *the second place*, the innocence of the prisoner is to be presumed,

until your minds are satisfied of the proposition I have just stated. That presumption began, when she was first charged with this offence, and it continues and is to be carried along with you, until your minds are satisfied of her guilt.

Being innocent of the crime, as you are bound to presume her throughout the evidence, and the weighing of the evidence, she cannot know how that death occurred. I say she cannot know it. It is certainly possible, that she might be innocent, and yet know how the death occurred; as, if it was a suicide, and her husband had disclosed it to her before he breathed his last breath; or, if it was an accident, and she had discovered how the accident occurred. But all such suppositions as these are extravagant and unreasonable. The mind rejects them, too, as unnatural and inconsistent with the posture of an innocent mind arraigned upon such an accusation. If she, being innocent, really knew how this death occurred, she would tell it; the contrary supposition is too monstrous to be entertained. It is therefore logically and rationally correct to say, that being innocent, she cannot be supposed to know how the death was occasioned.

I assert, therefore, that her position at this moment, in the eye of reason and of the law, is simply this—that being innocent of the crime, as you are bound to presume her, she cannot account for that death.

But because she cannot account for it by positive proof, is she therefore to be condemned? God forbid. Nay, He does forbid it. Such a condemnation is impossible. The case does not begin to be one of those, where the party is bound to account for any thing. There is a class of cases, where the law requires the accused to account for the facts. As where stolen goods are found in his possession; that possession must be accounted for; or where the weapon with which it is certain one has been murdered, is found in the possession of the accused; that possession must be accounted for. But here, no instrument or means of the death, is traced into her possession. The presumption is and must be, that she is innocent. She must therefore be silent. That silence is the silence of truth. She cannot show you how it occurred, even if the law required her to do so, and it never has required and never will require an impossibility.

If, then, she cannot show you how it actually did occur, what may she do? She may show you how *it might have* occurred. She may show this, in one or in several ways, and may then call upon you to decide, whether the supposition which the Government assert, excludes all other rational suppositions, and whether the facts are not only consistent with guilt, but are to a moral certainty inconsistent with innocence.

Suffer her not, then, Gentlemen, to be affected with the cruel imputation, that her defence is inconsistent. There might be cases, where the suggestion of several suppositions in which the fact might have occurred, would be felt to be a tampering with the jury.

But such is not this case. It is the absolute necessity of her position, from which nothing but Omniscience can relieve her, that she should not be able to show you how this death was occasioned. But she can show you how it might have been, and her right to do this can no more be restricted to one or another line of defence, than *you* can say, before you have looked through all rational suppositions, it must have been thus, or thus, and we will look at nothing else.

I propose now, Gentlemen, to examine the case made by the Government, by the circumstantial evidence on which they rely.

1. The first of these circumstances is a train of conduct and actions and declarations of the prisoner, which it is to be argued, are explicable only on the supposition of her guilt.

The first circumstance urged to prove this, will be her sending to Dr. Storer to procure a certificate that Mr. Kinney died of cholera.—You will recollect that Dr. Storer himself supposed the deceased died of cholera, and in all the testimony that goes to show the sending for that certificate, how little have you that is definite, as to time, inducement or object. Witnesses have come voluntarily to the stand this morning to correct mistakes which they now admit they fell into yesterday, even in a matter on which life and death depend. What reliance can be placed on circumstantial evidence, where the circumstances are themselves in doubt?

Dr. Storer says it was on Tuesday she spoke of the certificate, and he concludes that because he had not then told her of the death by poison, and the suspicions, no one else could have done so, and he not have known it. This is an inference from an inference, neither of which are proved. The evidence is that rumors of the poison were rife on Sunday, and that, on that account, upon suggestions made to Dr. Storer, a second examination was made of the body.—Why then might not Mrs. Kinney have known of these rumors on Monday? but even if she did not know of them, she might have applied for a certificate as to the cause of his death, from various motives other than guilt—not to avoid suspicion as to herself, but for a negative purpose, to show what the actual cause of a death somewhat sudden and unusual, was. There seems to be a perfectly rational mode of accounting for her applying for the certificate, consistent with her entire innocence, even if she had not then heard of the rumors.

But when were these rumors set afloat? This Dr. Hildredth, of whom we know nothing in this case, but as we find him here and there promoting this prosecution; he had suggested the notion of poison, before this. Dr. Storer had heard of it. The rumors did exist and were all over the town on Sunday, Monday and Tuesday, and Mrs. Kinney *told* Dr. Storer there were such rumors, when she saw him, (as he says) on Tuesday.

But there is another and more rational explanation of this application for the certificate. I believe that Dr. Storer is honestly mistaken, as to the time. Miss Linnell says it was Wednesday after

the funeral, when the shop was first opened, and that she heard the rumors on that day, from a lady who came into the shop, and that she went directly to Mrs. Kinney's and told her, and that Mrs. Kinney immediately sent her to Dr. Storer for the certificate. It is now obvious that Miss Linnell went *first* to Dr. Storer for him to call upon Mrs. Kinney with reference to the certificate.—Yesterday Dr. Storer testified that it was Miss Collins who first called. Today he corrects it and is satisfied it was not Miss Collins who made the first call at the request of Mrs. Kinney. It is highly probable therefore, that the Doctor has been mistaken in this important fact, and that it was Miss Linnell who first requested him to see Mrs. Kinney respecting the certificate. If so it was on Wednesday, and not on Monday, that the Doctor had the first interview with Mrs. Kinney when she requested the certificate. I am aware that Miss Linnell testified that she thinks it was on Friday when Mrs. Kinney sent her to Dr. Storer; but on cross examination she says distinctly that the shop was first opened on Wednesday, that it was that day she first heard the rumors, that she carried them directly to Mrs. Kinney and from her went directly to Dr. Storer. These facts are much more satisfactory, in arriving at conclusions, than the probably mistaken recollections of Dr. Storer, as to the day of the interview.

But whatever you shall finally fix upon as the day of this interview with Dr. Storer, we shall, I am confident, be able to satisfy you that the rumors did exist, and that Mrs. Kinney had heard of them, when she first asked for that certificate.

The second fact that may be relied on, under the head of strange and unaccountable conduct, will be that Mrs. Kinney did not communicate to Miss Almira Collins, the fact that the Doctors had found poison in the stomach of the deceased; that after having had one confidential conversation with Miss Collins before, she did not communicate this fact to her, and from this you will be called upon to infer guilt. But why tell it to that lady? Who was Miss Collins? A stranger to Mrs. Kinney imported into her acquaintance within a week. If therefore, she had any grounds for apprehension when Dr. Storer told her of the poison, Miss Collins was the last person to whom she would communicate it, at that time. But there was a still deeper reason why she did not communicate it, than the length of their acquaintance. There was lurking in her own heart a reluctant suspicion that her husband had committed suicide. Brooding over this painful and distressing thought, is it natural that this wife who had from first to last covered up his frailties from the world, with all the diligence of affection, should, when she learned a fact that brought a crushing confirmation of her doubts, have told it to a young woman whom she had known so short a time? To my mind, it is wholly unnatural; and when I look at this matter in connection with her desire to have the death certified as a case of cholera, I see nothing that is not rationally explicable with her entire innocence.

But it is said, she did afterwards admit to Miss Collins what the

Doctors had told her. *How and when?* Miss Collins then knew of it from Dr. Storer. She first spoke of it on this occasion to Mrs. Kinney. The relations of things and of the parties were totally different. The fountains of feeling were not voluntarily opened. They were touched by the hand of another, and at the slightest touch the tremulous waters of grief gushed out. Then came that remarkable scene, which more than any thing else proves the mingled agony of grief and suspicion of suicide with which her heart was torn, until it burst into the ejaculation, "Oh, that God would show the mystery, why it is that George has done this!"

Such an exclamation was perfectly natural, if we suppose the deceased to have died by suicide, and not murder. So far from being extraordinary, on the supposition of suicide it was a natural exclamation of the wife, not volunteered in a confidential conversation, but brought forth by the communication from Miss Collins, that she had heard the fact of poison having been found. How much more natural and charitable to attribute this exclamation to supposed suicide, as the motive, than to murder, and that by a wife who is not proved by a single witness to have ever evinced ought but affection and devotion to her husband, to the last moment of his existence.

In further explanation of this and other circumstances drawn from the conduct of the prisoner, we shall prove that the deceased was a ruined man, and by his own acts. That the declarations of the wife as to his habits of gambling and dissipation, were sadly true, and that in all probability, by his own statements, it brought him to a violent death by his own hand.

We shall distinctly show that he was beset by a terrible habit of gambling; that it preyed upon his conscience and exerted a tyrannical control over his better feelings; and with the light thus thrown upon the case, you will be called on to explain for yourselves, the circumstances that have been distorted by suspicion, rumor and prejudice, into a charge of murder, against the wife. I ask you, gentlemen, to hear and weigh his evidence, as it ought to be weighed, in a scale where is suspended the issue of life and death to the accused; to look at human nature as it ought to be viewed, with no extravagant theories, but with a *knowledge* of its workings and its sufferings; to look at the whole matter naturally, in connexion with the fact that no cause of quarrel, no dissension or difference existed between the two during the life of the husband, and that they never spoke of each other in life, but in terms of kindness and affection. I ask you to look at her conduct, in its most natural light; upon this wife, beyond all question attached to her husband, distressed by suspicions of his violent death, anxious to conceal his faults, doubting as to the cause of that death; surrounded by rumors and vague surmises; and then say whether all these circumstances are not consistent with the supposition of suicide, as the cause of the death.

2. The second material circumstance in the chain of evidence relied on to convict the accused, is the supposed sickness of Mr. Goodwin, from tasting of the sage tea. I say *supposed* sickness from

that cause, because he does not himself directly swear to it, and nowhere assigns that as the cause. Whether he mentioned the sickness to Dr. Snow or not, in his first interview with him, which remains in doubt, it is certain that he did not allude to the *sediment* which he now swears he saw in the bowl. He was late, in naming the sage tea as connected with his sickness, and it was not until Mrs. Kinney had gone out of town, and he was pressed upon the subject.

But look at this remarkable fact, that this young man, who leaves it to be surmized by inference that the sage tea caused his sickness, remained on perfect terms of friendship with the prisoner, procured tickets for her journey to Vermont, put her into the cars, and bid her God speed on the way! when all the time he must have known that if it was true that she had put poison into that tea, she had deliberately perilled *his* life by poison, as well as murdered her husband.

Goodwin's supposed sediment is another link of this circumstantial evidence. Well, gentlemen, there might have been sediment in that tea, or there might not. It might have had one origin or it might have had another. Is there anything satisfactory in this evidence? But you are trying a human being on the issue of life, and you will apply all the facts that are to lead to the forfeiture of that life to the laws, with the extremest caution. This young man thinks he saw a white sediment in the tea, and yet he never said a word about it in his testimony, under oath, before the Coroner's inquest. He states this distinctly, and we have the fact that even after he supposed the man had died of poison administered in that tea by the wife, yet he had never said a word of the sediment, or breathed it to a human being, and he tells you now that he had no particular motive in looking at it; that he set the bowl down upon the bureau and never examined it at all, and all this happening in the evening, by candle light; and so little impression did it make upon him, that when conversing with Dr. Snow upon Mr. Kinney's death, and the rumors of poisoning, he never alluded to this supposed sediment.

Can you reconcile this with any proof now, as to the existence or nature of that sediment? The whole town was rife with the rumors; Goodwin meets Dr. Snow; they converse of the death, freely and fully, and he never says a syllable to him of the sediment. How are you going to dispose of this testimony but by supposing that he saw what might be sugar as well as anything else, or that he saw anything else as well as sugar?

Can you say that this testimony is entitled to any consideration in a chain of evidence to convict of a capital offence?

Another fact the government will probably rely on is the purchase of arsenic at Dr. Mead's. It is worth while to see how this comes to be incorporated into the case. Some person, at some time purchased arsenic at an apothecary's shop in South Boston. How came it into this case? It seems that this Dr. Hildreth, of whom we know nothing except that he is inciting this prosecution here and there, and of whom the prisoner says, he is her most bitter enemy,

went to Mr. Mead's store to inquire if any one had purchased arsenic.

It seems that the fact of one or rather *two* women purchasing arsenic, came up among the rumors of the day, and Dr. Hildreth started upon the scent. But what light does it throw upon the case? Beyond the mere act of purchasing arsenic, by some persons unknown, it has no connection with this trial. By no efforts or experiments can they trace this purchase to the prisoner. It turns up, by the inquiry of Dr. Hildreth at Dr. Mead's.

The young man swears he cannot identify the defendant. He has sworn so, before another tribunal, the inquest that sat upon the body, and he repeats that denial here, in the most positive terms. I therefore have a right distinctly to assume that the defendant was neither of those women who purchased arsenic.

Matters being thus, the young man having sworn before three several tribunals that he ~~COULD NOT~~ identify the prisoner as the person who purchased arsenic of him, an extraordinary step is taken. The Attorney General directs Dr. Mead to advertise for the women who purchased arsenic at his shop in August; and thereupon two days before this trial comes on, the handbill produced to Dr. Mead, is issued by him. Now, why was this done? When the clerk had sworn over and over again, that he could not identify the prisoner, why was not that enough? But, as if for the purpose of eking out an argument, and to cut off the prisoner from the benefit of the ten thousand chances of its being somebody else, an attempt is made to exclude the probability of its having been any body but her. It is a proceeding analogous to the effort made here yesterday, to make the young man, their own witness, admit that he did not know his own handwriting, after he had, in answer to their own question, sworn that the word *Poison* on the blue paper was *not written by him*.

But, if this handbill is going to be urged upon your attention, I pray you to observe how utterly unsafe it would be to rely on it as excluding any thing. It calls upon the woman who purchased arsenic, to come forward, *for the purpose of removing suspicion from Mrs. Kinney*; and now that no one has come forward, does it follow that all other women have of necessity seen the handbill? or that any woman who had purchased arsenic for a mischievous purpose, would make it known? or that, if purchased for an honest purpose, the common reluctance to be made a witness, would not keep the purchaser away? Is the suspicion any the less removed from Mrs. Kinney, than it was before? There is no suspicion that can touch her, from all the facts that have occurred respecting the purchase of arsenic, after the clerk has virtually sworn that she is not the person.

Another link in the chain of circumstantial evidence, is the paper found in the house, marked "poison." On this evidence, the fact is obvious that this paper contained no arsenic. It is not such paper as druggists use. But is it not to be supposed that if anyone brought poison into the house, to commit murder, they would have destroyed the paper? Why should a part of it be left? And if any part was

left, would it be likely to be the precise fragment that bore the fatal word? It is certain that paper was not the vehicle in which the poison was conveyed to the deceased, even if you are satisfied that he took poison. This is shown by their own witness, Coroner Shute, who went all round the city, and could find no apothecary to identify the paper. This excludes the idea that it came from any druggist's shop in the city, and negatives the supposition that the poison which is brought into this case was ever contained in that paper.

Perhaps, too, we may be able to suggest a probable account of this paper, but if we shall fail, from want of that omniscience, which we cannot command, in tracing human events, still it fails to touch us, from its utter disconnection with the prisoner. The burden of proof to explain it, is not upon us, but upon the government to fasten it upon the prisoner beyond a reasonable doubt.

5. The fifth circumstance relied upon by the Government, will be the evidence respecting the sickness of the family on Thursday.

Gentlemen, the great Commonwealth of Massachusetts, by its official agents, is prosecuting for her life, under a capital accusation, one of its subjects, a feeble woman. Evidence is introduced of a subsequent transaction, and it is not very easy to see how it is to be urged in support of the indictment. Not a word is said in the opening, to notify us of the point to which the evidence will be urged; and now, when the Court has no power to compel a statement, and we ask one of the clemency of the Attorney General, he refuses to tell us how and to what this evidence is to be urged. The Attorney General is to follow my colleague, after he has closed the prisoner's case, and *then* we are to learn, for the first time, to what this evidence is to be pressed. The course of the prosecution is most extraordinary. We are left to blunder on in conjecture, with no means of anticipating the argument, except such as our imaginations can devise. Whether it is to be urged as proof of a design in Mrs. Kinney to remove and destroy all these persons, who were at the breakfast that morning, in order to get rid of their testimony; or whether it is to be used as evidence of a disposition in the prisoner to poison for the mere pleasure of it, we are in the dark. But let it be remembered that there were some connected with that breakfast whom she could have no fear of as witnesses. To what end should she seek to destroy Mrs. Varney's son? To what is the government driven? At the same time she was destroying these persons, she was attempting to take the life of the innocent child of Mrs. Varney. This must be the supposition if any is to be drawn, from this part of the evidence, and this is a degree of extravagance and improbability amounting to positive absurdity. But whatever the object in introducing this testimony, we can show that the same effects were produced on her, as upon the rest who eat of that food.

Finally the government has utterly failed to show you a *motive*. I agree that in point of law they are not bound to prove a motive, provided you are satisfied upon this evidence, that the prisoner was the agent, and that no one else could have been. But where cir-

cumstances are doubtful in their application to the party; *motive* is an essential ingredient, and without it, the evidence must fail to convince.

Here is not only a total absence of motive, but the testimony of the Government is uniform that the relations between Mrs. Kinney and her husband were kind and affectionate; thus repelling all reasonable supposition of motive on her part to attempt the life of her husband.

But gentlemen, I do not intend to leave the relations of this husband and wife upon the testimony of the Government. I shall bring before you the scene of that last hour, when they parted, he to go to his final account, and she to be left to struggle with the rude world and to encounter this accusation. When you shall hear the simple and touching description of that scene, at it has been described to me, if there is a man who can then believe that this woman went through a series of acts of affection, with an art and hypocrisy that surpass all human nature, he can believe more than I can. I believe that human nature is bad enough. But there are some things which it can *not* do.—The noble, the generous, the tender, the deeply pathetic, it can *not* counterfeit, in the midst of murder and malice. I shall show you that this dying scene was pathetic beyond all other description, than that of the simple narrative of the facts; and I shall then confidently claim your belief that the union of such exhibitions or real feeling with deliberate murder, at one and the same time, was never known to Nature or to Fiction. Why even Macbeth, who is represented by the great master of all men's conditions, as a sort of tender and moralizing murderer, and who had wept over the virtues and graces of the meek Duncan, whom he was about to slay, as he approaches the fatal chamber, marshalled by the dagger which his imagination had painted on the air, lays aside all his tenderness; and bracing himself up for the occasion, he stands forth the murderer and nothing but the murderer, and exclaims—

Whiles I threat, he lives.

Words to the heat of deeds too cold breath gives.

I come now to the various suppositions which we shall suggest, as the modes in which this death might have been occasioned.

Our first hypothesis is,

1. *That the poison might have been administered by Bachelder, by design, from mal-practice.*

Whatever may have been this man's history or pretensions, here he was. He examined Mr. Kinney, and supposed he found secondary symptoms of venereal disease. Now I do not think that the deceased had that disease; but that Bachelder made a mistake, or designedly made him believe he had it. I shall show that there are many cutaneous diseases that may be mistaken for this. He had had the varioloid, and you will see when the regular physicians come to testify, that it requires a practiced eye to draw the line between the effects of the two.

Bachelder gave the deceased medicine with reference to this dis-

ease. He says he gave him a cathartic pill. I shall show you he has not been uniform in his statement. That he has said the first thing he gave was what he is pleased to call his bowel pill. We shall prove that he refused to disclose the ingredients of that bowel pill, of which he claims to be the inventor, and that he has carefully kept the ingredients of that wonderful quack medicine a secret. We shall also prove that arsenic is administered internally for the venereal disease; that Bachelder has admitted he had used arsenic in his medicines, and that he has given a very different account to two gentlemen, as to the kind of medicine he prescribed for the deceased. We shall further prove that arsenic is a cumulative poison, and may be safely given to a certain point, but if carried beyond that, it passes off in a wrong direction, and destroys life.

This goes to account for Kinney's appearance, until Saturday, when the last dose was given, the cup run over, and the man was destroyed.

But it is not material whether Kinney had the disease or not. Whether Bachelder was mistaken or not, it leaves the inquiry whether arsenic was not in that bowel pill, or in some of his other medicines.

2. *Our second hypothesis will be that the arsenic might have been administered by Bachelder, unconsciously, by accident.*

The poison might have been given in the medicine administered early in the week, or in some of the other medicines which he gave on Saturday evening. He tells you that he now has none of that cathartic pill. What did that contain? Is the supposition that it contained arsenic without the knowledge of Bachelder less rational than that a wife, without motive, should poison a husband she seemed devoted to, to the last?

Then as to the powders. They were supposed to be an imitation of Dovers powders, and yet by some accident, arsenic may have got into them, from the resemblance of that poison to other ingredients. Such a supposition is not only not impossible, but by no means improbable. We shall show by unexceptionable testimony, by a person of great experience, that the danger of using arsenic by mistake for some other white powder, is very great.

3. *The arsenic may never have been in the deceased at all, but may have been introduced into the contents of the stomach, by accident, since the contents were removed from the body.*

The symptoms were identical with those of cholera. The physicians treated the case as cholera down to the death, and the post mortem examination. Are you satisfied that it might not have been introduced there by accident.—The contents of the stomach are put into a bottle that comes out of Goodwin's paint shop?—You know not what its contents had been. You are told by the witness that as a painter he had a pigment in his shop, (King's yellow) which we shall show contains arsenic.

Nevertheless, you have only to bear in mind that you are not to call upon us to satisfy you how all these circumstances might have happened. The government must show that by none of these means could the deceased have come to his death.

4. *The arsenic, if it was the real cause of death, might have been taken by the deceased, to destroy his own life, obtaining it from Bachelder, or from some one else.*

We shall show that the deceased was a ruined man; ruined by that vice which of all others leads directly to self-destruction—*Gambling*. This will be proved to you as the cause or motive to commit the act. We shall further show that he was utterly insolvent in his business, and that the idea of his having a more profitable job, or being in better prospects than usual, is a mere delusion.

Gentlemen, it gives me unaffected pain, to be obliged to make these disclosures. I cannot but remember in whose behalf I am compelled to make them. I cannot but remember that I stand here to speak for a wife of the vices of a husband, and that she has ever locked those failings in her heart, until a cruel and bitter suspicion has driven her to reverse the very course of human affection. I cannot but think too of those relatives of his, who are far away in the green home of his youth, and who have little suspected the truth of his more recent history. Alas! how should *they* know the dark temptations, the snares and dangers which beset men in a great city while

Along the cool sequestered vale of life,
They keep the noiseless tenor of their way.

They cannot realize the belief that he was weary of his life. But it is true. This man, with a temperament subject to melancholy, had run through much of life's experience, and felt that it was of little worth. He had seen much of the world, for a person of his condition; he had been at times somewhat of a wanderer; and at the period of his death, he was a man who had nearly passed the climacteric of life, in years, and had quite passed it in that feeling and experience of its worthlessness, which seems to be the fate of certain minds. Upon such a character, the habit of gaming had fastened itself with a perfect tyranny.

We shall also show you, that the deceased entertained and expressed the *intention* of self-destruction. By this I do not mean an intention to commit this particular act. I use the word in a legal sense, to indicate that the idea of suicide had long been familiar to his mind, and had been manifested by repeated declarations to the effect that he might at some time take his own life.

These, gentlemen, are the main grounds on which we shall rest the defense, and with these, nay without them at all, upon the testimony of the Government alone without a word of defense, we confidently look for an acquittal; an acquittal, not only from *crime*, but from unjust suspicion; and when that acquittal is reached *here*, it is to be hoped that the community will do something to repair the wrongs and injustice it has inflicted upon this unfortunate woman.

THE WITNESSES FOR THE DEFENSE.

Dr. Jacob Bigelow: When I arrived at the house he was evidently in the last extremities. Was satisfied at once that the

case was hopeless and remarked to Dr. Storer that the case resembled cholera and a post-mortem examination would be very desirable. In the afternoon of the same day attended the post-mortem examination with Drs. Storer and Jackson and others. On opening the stomach a redness was found and several large ecchymosis or dark spots. Dr. Jackson suggested a suspicion of poison upon this and the contents of the stomach were taken out for future medical examination. After this I lost sight of

the case and have had no personal knowledge of it since. Was informed at the house that an irregular practitioner had been in attendance in the first stages. Some medicines were produced by Dr. Storer as being the medicines left by that practitioner. On tasting them I thought they resembled Dover's powders. There might have been sufficient arsenic in one of these powders to destroy life and yet probably not have been susceptible to the taste.

Mr. Curtis: Is arsenic used in a particular disease as a remedy?

The Attorney General objected that the witness, Bachelder had testified there was no arsenic in those powders, and it was not competent to contradict that, by this indirect mode of showing that arsenic might be used in such a disease.

THE CHIEF JUSTICE: In the present stage, we think it competent, as tending to show that in selecting medicine for this particular case, there might have been medicine selected containing arsenic, if that be an ingredient of such medicines.

Witness: Arsenic is sometimes used as a remedy in such cases by authorities. Sometimes combined with black pepper and sometimes by other vegetable powder. Arsenic is a cumulative poison, the effect of which accumulates the longer it is taken, so that in the end a different result is produced than was intended on its first use.

A common case of poisoning by arsenic often has a resemblance to death by cholera. White arsenic being a substance difficult of solution, it might remain in the stomach undissolved for twenty-four hours. I am a member of the Massachusetts Medical Society. Have never had personal knowledge of Dr. Bachelder; never heard of him as a practitioner except in this case.

Cross-examined: Have known of no case of cholera for several years. I believe the man died of arsenic. There is no arsenic in the blue pill. Some authors say it has no taste and others that after it has remained long on the tongue, it is astringent and sweet.

Henry Bachelder: Was present at the death of Mr. Kinney. Had some conversation whether he felt he was a dying man. He said he felt so unless he got relief. Asked him if he realized his situation and he said he did. Mrs. Kinney asked him if he wished to see his friends, naming them. He said yes, but they could not probably get there before he should be dead. Mrs. Mrs. Kinney sent some person to call his friends. Soon after Mr.

Kinney took his wife by the hand and said, "Hannah, you have been a good woman to me." Mrs. Kinney wept. He then turned to the little girl, Dorcas, and said, "Will you be a good girl to your mother?" She said yes. After that he said, my dear, where is it best for me to be buried? She said if he had any particular desire she would attend to it. He dropped it then and said, no matter where my bones are laid. In a minute he asked if he had better be buried under arms; the company he said would turn out; but, said he, you will act your pleasure.

She spoke to him and he did not answer. She then placed her mouth to his and said, "good bye, George". He breathed three-quarters of an hour, but remained senseless and died. His wife was there all the time. Throughout the whole of this scene discovered nothing in Mrs. Kinney but that she attended on him as a wife would in such circumstances, with tenderness and affection.

Cross-examined: Was there perhaps three hours. Think he died about the meeting hour. The prayer was made an hour or more before. His request was, will you pray with me? Mrs. Kinney suggested it to him. Do not recollect that Mrs. Kinney alluded to the cause of his sickness or said anything about meeting in heaven. Noticed no want of attention on her part.

In Chief: Have seen Mrs. Kinney frequently at Lowell. Had not seen her after I removed to Boston till the death of her husband.

Willard C. Lane: Am a saddler. Was acquainted with Mr.

Kinney fifteen years. Never heard him speak of his wife but in the kindest terms. Never heard any complaint of him from her. Was at the house Monday morning after his death. Mrs. Kinney was alone, in tears. She said, "Oh dear, George is gone". Saw Dr. Storer Tuesday night; he said he first thought he died of cholera but that arsenic was found in his stomach. He said he had asked for an examination and she was as willing as any one would be under like circumstances. That same Tuesday evening Mr. Johonnet and myself both advised her to go into the country.

Last saw Mr. Kinney on the Thursday before his death; he said he was unwell; told him he would be so if he stayed out late of nights; asked him if his wife complained; no, he said, he never saw a scowl on her face in his life. Met Mr. Danforth a fortnight after Mr. Kinney's death. Proposed to call at Mr. Harrington's office and see if Mr. Kinney had called there. He said he had administered medicine to Mr. Kinney for the venereal disease.

Cross-examined: At the funeral I did not hear her spoken of or pointed out as a murderer, neither before nor after the funeral. Never heard her say that she was pointed out as such at the funeral. Never complained to me of her husband. Saw him intoxicated once last Spring in the evening, in the street. Have heard him say he played for money within a year. Have heard him say that it took him a number of days to get over it when he had been on a hard train. As to his temperament, a very little thing would elevate him and a

trifle press him down. Have seen him many times when gloomy. His age was from forty to forty-five. Should think him a man of courage but never saw it tried; was not apt to talk about his private affairs.

Charles H. Johonnet: Have known Kinney since he was a small boy and Mrs. Kinney six or seven years. Was present at his death. Was at the funeral and went in the carriage with her. Heard the reports of the poisoning on Tuesday; told them to her on Wednesday or Thursday. I advised her to go into the country and perhaps these rumors would die away. She thought of

going on Thursday but did not go until Friday week after the death. Do not know anything in particular as to his temperament; his moral character was pretty good; have heard him speak of gaming himself.

Henry Danforth: Worked for Mr. Kinney last July. Went to see Dr. Bachelder with Mr. Lane to learn if Mr. Kinney was diseased; he said he was with venereal; said he gave him pills and powders and that was all. Mr. Kinney gamed sometimes; I have seen it and seen him lose money at play; have heard him say——

Mr. Austin objected to any testimony as to what the deceased man had said of his gambling or habits, to prove that fact, it being hearsay.

Mr. Dexter thought the state of the case made this evidence a matter of necessity. It was designed to show probable grounds of his death and his own admissions are the strongest evidence of the facts.

THE CHIEF JUSTICE: It appears to the Court that it is admissible. It is not dying declarations and is not put upon that ground. But here is a case where a party is speaking of himself, and it comes in with reference to the motives of his actions.—Such as if he had declared his intention to take poison. In connection with the act of his decease, it is admissible.

Mr. Parker: Will the Court fix the limit how far back it shall go?

THE CHIEF JUSTICE: That goes to its credibility:—No limit can be fixed.

Witness: Had heard him say he had lost ten dollars the night before; this was last summer. Have seen him play loo at a public house and lose money.

Cross-examined: Have been at convivial parties with him. Can not say if five, ten or forty times, I have seen him play. It was before I worked with him. It was at a public house in Federal street—the game was limited I

should think—to ninepence a corner.

He told me another night, I think last winter, that he had lost nine dollars. Never heard him speak of winning. Have known him play at ten pins for money. Did not know that he belonged to an Independent Company. He never complained to me of his losses.

Charles Remick: Had known

Kinney three or four years. Conversed with him the Thursday before his death. He said he was unwell and could not relish his food. Knew of his gambling last winter. Should think it a habit growing on him. Have heard him speak of winning or losing ten to fifteen dollars at a time. Never heard him speak of his wife to say a word against her. Never heard her complain of him. Have been in the habit of going to his house since he was married. He was in embarrassed circumstances when I was with him; old embarrassments from a former concern. He was a benevolent, open-hearted man, fond of company and liked to go out to parties. He was quick in temper and quick over it. He drank his liquor every day and more than did him good in my opinion. Should think losing would lead him to take an extra glass.

Cross-examined: Should think his losings were greater than his winnings. Have heard him say he should have met his demands more promptly if he had kept in the shop more. Think gaming called him off; have known him play in the day time.

(To Mr. Paker): Am not a teetotaler. My standard as to how much drink is good for a man, is that one glass is more than is good for me. His business was done as an agency. Never knew any attachment of the stock in the store. He was absent from the shop more than he ought to have been. I have known him to go off with men and when he came back I was satisfied he had been gambling. He generally paid off the hands. No fault to find.

Edward L. Tucker: Was a

short time partner with George T. Kinney—in 1838—for about five months. I put in \$400 in the business. Kinney put in nothing. Know the fact of his gambling. Last April conversed with him on the subject of his misfortunes caused by gambling and he acknowledged it to me. The habit continued all the time I was connected with him. Could always tell when he had been gambling by his appearance—melancholy and uneasy. I separated from him in April or first of May, 1839. I once lent him ten dollars which he acknowledged he lost gambling.

He used to tell me that his wife supported the family. He said he was involved and unless he laid it to something else they would break in upon him and ruin him. He said he did gamble and could not help it and always should. Asked him how he felt when he came out of these places. He said that he could not describe it; he had often felt in doubt whether to go home or to go and make way with himself. He repeated it. "Yes, I have often been at a stand whether to go home to my wife or to go and make way with myself." Told him I was very sorry he was so far gone. He said, "Tucker, so it is, and don't you be surprised at any time to hear I have made way with myself." He referred to a particular time when he did not come to the shop and said he took laudanum enough that time to kill four men. Said if it had not been for his wife he did not know what he should have done. Never knew any difference between Mr. and Mrs. Kinney.

Dr. Enoch Hale: The well wa-

ter of Boston contains lime and will leave a sediment in the bottom of the vessel when boiled and drained off. Think the well water throughout the city generally will produce the sediment when boiled.

Ebenezer Smith, Jr.: Am administrator of the estate of Kinney. The property of his shop and Mrs. Kinney's on Bromfield street was sold at auction. Her property was mortgaged. The mortgage was paid and \$80 or \$90 left.

John Henshaw: Am a druggist. Am aware that mistakes happen in dealing out medicine. Have known poisonous drugs to be given out when milder medicines were called for. Am particularly careful. Boys are sometimes trusted to deal out medicine.

Mrs. Sarah Goodsill: Have known Mrs. Kinney about 18 months—lived with her three weeks. Afterwards boarded with her. Mr. and Mrs. Kinney lived in perfect harmony. Never heard either say a thing against the other.

Dr. Ethan Buck: On Friday, 14th August, Mrs. Varney called on me and told me she had been sick. She said it was owing to what she had eaten for breakfast. She had eaten cucumbers and apple sauce. Have known cucumbers to produce the kind of sickness she described. She exhibited no appearance of having been poisoned.

Earnest H. Cheatham: Was in Bromfield street on the day of the funeral of Mr. Kinney. Heard rumors as to the cause of his death. The rumor was general.

Thomas Ridley: Was in Bromfield street the day George T. Kinney was buried. Heard the

rumor that he came to his death by poison. Heard no particular one accused.

Cross-examined: There was a great crowd. The military was out. Heard the remark about Mr. Kinney's having died by poison from one person.

Albert G. Leach: Married a sister of Mrs. Kinney. Was in town in February last. At one time Mr. Kinney remarked to me that if there was not a turn of the tide or something new did not turn up he should have to go to the poor house, as he had not enough work to support his family. There was a great difference in his appearance and temperament at different times. He was eccentric. In my last visit to Mr. Kinney he said he did not think much of the world. He said he thought but few people could be confided in and that honest people were few and far between. He spoke of his misfortunes as having been brought upon him by the base management of others. He lived with perfect harmony with his wife. Have heard them speak in high terms of respect of each other.

Mrs. Hitchcock: Have known George T. Kinney since 1820. He had told me that he determined to put an end to his existence but had been prevented from so doing. This was in 1835. As a reason he said in a letter he had been unfortunate and had lost his property and become poor. Since that time (five years last June) he said his life was a burden to him and had no charms which bound him to earth. Mr. Kinney's temper was irregular—sometimes cheerful, sometimes gloomy.

Coldridge Dewey: Am a cousin

to the late Mr. Kinney. He returned in 1828 from a four years' voyage to the south. He was very much changed. Was gloomy. He told me he had lost all his property in the voyage. Have seen him since his marriage with Mrs. Kinney. They lived in perfect harmony. Never heard him say anything against his wife.

Dr. Reuben Harrington: Dr. Batchelder and I entered into a co-partnership contract. He was to tend the store. I had nothing to do with his nostrums. Had a conversation with him about the death of Mr. Kinney. He mentioned at one time, whether jestingly or not I cannot say, that he had killed one man. He said he had given him some of his bowel pills and the man died the next day. Never inquired of him as to the ingredients of his bowel pills. He said he had given him a syphilic pill. This pill is given for the venereal disease. It is made by myself. Dr. Batchelder does not make them. They are different from the bowel pill.

The Sunday following the death of Mr. Kinney two gentlemen came into the office and inquired for Dr. Batchelder. I showed him the syphilic pills and he said they were the same as he gave Mr. Kinney. He has told he used arsenic and poke-root in his compositions and treatment. He said he used powerful medicines which other doctors did not know how to use. I told him he must be aware it was dangerous, and was using edge-tools.

Cross-examined: Dr. Batchelder asked me if I would put in the advertisements the title of M. L. to his name? I told him I would if it belonged there. It

was put in. I have recommended him as a good physician.

Nathan Pratt: Have seen Dr. Batchelder's bowel pills. Was unwell at one time and called on him. He gave me six pills which he said were bowel pills. Took them home and took three at one time, which came near killing me.

Addison Avery: Am a leather dealer. Was acquainted with George T. Kinney. Had dealings with him in 1836 and 7; sold him leather on credit several times. Mr. Kinney was a ruined man at the time of his death. In 1839 Mr. Kinney sent for me to come up to the jail in Leverett street. I went there and found him in the prison for a debt, as I understood, for about \$60. He was then in debt to me and I thought the best way was to bail him out. After this I had heard of outstanding debts against him and advised him to take the benefit of the act.

Doctor J. A. Tibbetts: Attended the postmortem examinations of Mr. Kinney. Took the bottle containing the stomach to Dr. Jackson's office and left it on the table. There was from one-half a pint to a pint. No one in the office when I left the bottle there. Never saw the bottle again.

Mrs. Abby Barchi: Have noticed a sediment from East Boston sugar, like lime. Have noticed it in the bottom of tea; the sugar had all been dissolved.

Cross-examined: Never noticed the sediment from any other sugar; never have known anyone made sick by it.

Mr. Brown (recalled): Never have noticed sediment from East Boston sugar. Have used it in

compositions. East Boston sugar is not as strong as white Havana and for this reason I have not used it as much. There is a sediment in all sugars, more or less. Have supposed lime and alum are used in refining sugar.

William Aspinall: Have used East Boston sugar; have noticed a sediment from it.

Charles D. Hildreth: Have known Mrs. Kinney about eighteen months. She wrote me this letter on the Monday after Dr. Storer told her that her husband died with poison:

"I wish you would call on me this morning. I want to relate to you some things which have been long buried in my breast. The time has come when I must tell them. If Dr. Sharp and Dr. Bolles would come with you I should be very glad."

I went with Rev. Dr. Bolles. There was no particular secret related to us. Went again with Mr. Driver. She said she saw an expression on my countenance and that of Dr. Bolles at the first meeting which led her to alter her mind about the conversation.

Cross-examined: Did not know that the paper marked "poison" was found in the house till after the coroner's inquest. Made the inquiry as to selling poison at Dr. Meade's in consequence of a suggestion of the attorney general that it would be important to find who had purchased poison. Dr. Storer told me of the suspicion of poison on Sunday and he suggested a second examination.

Stephen Thayer: Knew Mr. Kinney and employed him frequently to make hose. Saw him the Friday before his death at his shop. We went into a bar-room. I asked him what he

would take and he said milk. I asked him if he did not drink. He said he had been unwell for a fortnight and had left off. That he had drank brandy and then gin, but had found it did not agree with him. He said he had got a contract for hose for Lowell and was doing pretty well.

Cross-examined: Have known him occasionally to drink. Never saw him intoxicated. Have not known much of his habits for two years past.

Elias Thayer: Before Mr. Kinney's death went to Portsmouth with him on business. Saw no change in his disposition. Generally in good spirits. Saw no gloom or melancholy. He was temperate during the journey.

Cross-examined: Never knew him intoxicated. He took a little daily.

Dec. 25.

Charles C. C. Mower: Was a saddler. Knew George T. Kinney in 1822 when he was one and twenty, in Windsor, Vermont. He was foreman in the shop. Our connection continued till 1824 as partners in trade at Walpole, New Hampshire. He was in the habit of playing cards, as most young men were at that time.

There has been a change in his general habits, since he came to this city. He left me in 1824, and went to sea; next saw him in 1836, in this city. Have seen him since his marriage and heard him speak of her in the highest terms; never otherwise.—His character formerly was cheerful; when I saw him here he was changed, which I attributed to his embarrassments. When with me he seldom took ardent spirits, but when I saw him in this city

he drank more. Saw him at the Tremont Theatre one evening; he went in affected with liquor, and slept through the first act.

MR. DEXTER FOR THE DEFENSE.

Mr. Dexter: Gentlemen of the Jury—I am now to speak to you the last words of the prisoner at the bar, before you pass on her deliverance or death; and little as I may apprehend the result of your deliberation, it is impossible I should approach the task without great emotion. It is not any difficulty or doubt in the cause, but the mere possibility of a monstrous injustice being done, which lies with an oppressive weight upon me.

Confident as I am of her innocence, I cannot forget the accidents that attend all human deliberations, and I cannot divest myself of all apprehension of the awful consequences of a mistake of the Jury.

But slight as are my fears and little as she may seem to have been oppressed during the trial, you, gentlemen, can know nothing of the terrible effort required to wind up her mind to this calm endurance: you see her only as she appears here, surrounded by all the circumstances of a public trial; and bearing it with a dignity, propriety and perfect composure that ought to be an assurance of her innocence. But you have not seen her in her secret hours of anxiety to be delivered not from the punishment of the law—for that she cannot seriously fear; but from a dreadful weight of public suspicion and odium. But this is not all; no matter what her confidence may be in the result, there are lonely hours that must terribly oppress her. She has looked through this trial and seen the prospect not only of deliverance from the law by your acquittal, but of a vindication in public opinion. But, gentlemen, she is human and a woman; and there must have been moments of a darker hue, when the possibility of an adverse judgment has overshadowed her mind. That most horrible spectacle of the execution of a human being, must more than once, have flitted across her aching vision. In the silent darkness of her cell, she must, at times, have seen the most horrible phantom that can scare the sick man on his

pillow, and even in dreams inflict upon us the last agony of the human heart.

But these are visions of the imagination. When we look deliberately at the cause, it is impossible that she or I should fear for the result.

One remark, by way of caution, I will make. It is this—It is difficult for you to resist the power of a preconceived suspicion; I do not mean in your own, but in the whole public mind. The prisoner comes before you loaded with suspicion, and you seem to sit here to try, not whether she is guilty, but whether she can clear herself of the cloud of suspicion thrown upon her. You and every one, look at her, unconsciously, as a person who is to prove her innocence, and every fact that does not prove her innocence, seems, by preconceived suspicion, to tend to confirm her guilt. It is the constitution of the human mind thus to be imperceptibly influenced, and when thus predisposed to receive impressions, trifles light as air, become confirmation strong. In fact, though not in law, the prisoner, by reason of these suspicions, is not on trial whether she be guilty, but is put to the bar to prove her innocence.

Resist these influences, I beseech you gentlemen.—Remember you are not to try the truth of public suspicion, but the truth of the fact as if she had never been charged before. You are to begin at the beginning, and try her, as if innocent and unsuspected: and if your judgments stop short of conviction of certain guilt, you are bound to acquit. Before you can touch the life of the prisoner, you must have a firm, unwavering conviction that here was a death by *design*, and that the person who committed it is the prisoner and no other.

This is a case of circumstantial evidence, and only of circumstantial evidence. You are therefore to be satisfied that the prisoner did the act, only by being satisfied that no other could have done it. You must also be satisfied beyond all reasonable doubt that it is impossible to explain the evidence without inferring her guilt—that the evidence not only shows her guilt but excludes that of all others.

The first enquiry is, *did the man die of poison?* I think you will have little doubt of that, but still there is great defect in the proof. I do not however, rely on that; there is strength enough behind it; but if there were not, there is such difficulty here, in the outset of the case, that you would pause long before you would say this proof satisfies you that the death was caused by poison. There should have been proof beyond all question, that the poison said to have been found in the stomach of the deceased, was there before he died. The proceedings were liable to many errors. The contents of the stomach were put into a bottle brought there by a painter, who uses the very same drug in his profession that was detected in the examination. He says he washed it out, but how, if at all, is not certain, and it is certain that neither Dr. Storer nor Dr. Jackson examined it.

The proof therefore, is not irrefragable that the poison was *not* in the bottle. Not long ago we heard of a whole family, in France, poisoned by the liquid from a bottle that had been washed with shot, which, as is well known, is made with the help of arsenic. This is not all. There was an extreme carelessness in keeping the bottle. In the late celebrated case of poisoning in France, the bottles and vessels were sealed with the utmost care, and in a judicial examination, evidence was required that no poison could, by possibility, have been introduced into them with the contents of the stomach of the deceased.

In the present case, the witnesses cannot state how the bottle was secured, or how it was kept. The student, Tibbetts, took it, at the house, carried it to Dr. Jackson's office, and left it there alone and unguarded for five hours, and then it was conveyed in the evening to Dr. Gay's.

Well, I may be asked how could arsenic have been introduced? That is not for me to suggest. It may have been accident; that is improbable. It may have been *designed*; that is horrible, atrocious, incredible! But is it less monstrous than that this wife, without a conceivable motive, should have murdered her husband? Even if you were to suppose that

a secret enemy of hers went to that office, while the bottle was exposed, and put arsenic into it to ruin the prisoner, it is not a greater crime, or less improbable, more less without motive, than that his wife should have murdered her husband; a wife of whom he had said that he never saw a scowl upon her face.

Gentlemen, if the case were not so strong for the prisoner on other grounds, I should press this. There is a want of care in this mode of proof that should weigh much in favor of human life.

Again, Dr. Storer at first said that *the man died of cholera*. It is therefore within the bounds of probability that he actually did die of cholera, and that after death, arsenic was introduced into the contents of the stomach. If you ask me if I believe this, I tell you no, nor will you; but it is possible, nay, not more improbable than this very crime without motive; and therefore before you condemn, you are bound to be satisfied that it could not have happened.

Another suggestion I am bound to make: the great liability in mistaking for some other article, a poison like arsenic, dealt out by Apothecaries' boys. If you ask me how this mistake was made, I do not know, nor does it belong to me to answer.

Again it is possible and not improbable, that Kinney *came to his end by the mal-practice of the witness who is called Doctor Bachelder*. It is impossible to suppose that he did it designedly, and that impossibility also lies at the bottom of this case—for you cannot on circumstance, convict of crime without motive.—But it is highly probable that Kinney came to his death by the mal-practice of that man. You know that he had been sick ten days, and had applied to Bachelder for advice, on Tuesday before his death. You know that he took Bachelder's secret medicines and grew worse. You also know that he took the bowel pill. You do not know that he took it till Saturday; but if Dr. Bachelder did give it before he is not the man to admit it here. You know that he has used arsenic, henbane, hemlock, and other deadly drugs, as remedies. You

know that the pills he left for Kinney and which were found and examined at the house, were composed in part of *pepper*, and Dr. Bigelow tells you that arsenic is a cumulative poison, that it is used in certain diseases, and some times used for the very disease for which Bachelder was confessedly treating Kinney, and when so used, is not unusually compounded with pepper. He told Harrington that he used arsenic in his practice, which was a powerful remedy, and perfectly safe in skilful hands.

Mr. Pratt also tells you that he took Bachelder's bowel pill, and he describes the effects of it. Bachelder prescribed two; witness took *three* and it almost destroyed him. I call to your mind the description that witness gave of the effects of these three pills—the symptoms were precisely those with which Kinney died, and for him Bachelder had prescribed *six* of these pills!

In what estimation did Bachelder hold human life upon which he recklessly experimented? When Harrington came home and asked him how his business prospered, he said he had killed one man, Kinney, to whom he had given his bowel pill. True the witness says this was said in jest, but is too much like poisoning in jest. So conscious was he of something wrong in his practice with Kinney, that when Lane and Danforth called on him, he denied all but the syphilitic pill; yet you have it in evidence that he told Harrington he gave his bowel pill. When he was sent for by Mrs. Kinney, and was told that his patient was worse, he immediately examined the pills that were left. Whether he found a mistake he does not tell, but you see what his misgivings were.

And what is the nature of this arsenic? You will recollect what I showed you of it. A fatal dose might be put upon the point of a penknife. Two grains are said to be deadly. You saw three grains, and how small an ingredient to put into a pill. And yet, take that little powder and "there is no medicine in the world can do you good"—your death is certain. I ask you then, are you satisfied beyond a reasonable doubt, that Mr. Kinney did not die from arsenic conveyed in these drugs?

Still, gentlemen, however great the weight of probability here, against that which attaches guilt to the prisoner, it is light compared to the probability of suicide. The evidence of that is so strong, that I am free to confess it entirely outweighs the evidence against Bachelder; but were I called upon to decide between him and the wife, as the agent in this death, standing as the case now does, I should believe the probabilities that Bachelder was that agent, sooner than I could believe it of a wife whose whole conduct towards that husband proves if she were the murderer, and thus acted and dissembled, there is not, I do not hesitate to say, her parallel to be found in human history.

You must not, however, lay aside the consideration that here is a mode by which the man might have died, without violation of the rules of probability, and consistently with the evidence in the case, and with the innocence of the prisoner. We are not bound to show you how it was done, but the government must show that it was done by the wife and not by another. We merely suggest; and one mode of the death is the mal-practice of Bachelder, and the other *suicide*. The two modes of accident and suicide should be considered together, and both rejected, before her participation in the death can be approached. Accident, though improbable when compared with suicide, is probable when compared with murder. When you come to consider the evidence, if indeed you consider it, you will weigh well all the circumstances, all the reasonable probabilities, connected with the death of Kinney and then say if you are satisfied of her guilt.

And now gentlemen, in that view, I propose to go with you over the evidence in this case, and lay before you the course of events as briefly as I can, and merely for the purpose of inquiring into the strength of the evidence against the prisoner, we will examine the two modes suggested as to the cause of the death, *murder* or *suicide*. The two run together in the evidence, but whether murder or suicide—if he took the poison himself, or if it was administered by his wife, it is clear that the poison was taken on *Saturday morning*. There is evidence, I know, of a certain character, as to poison having

been administered in the night, in the sage tea; but if any thing be clear it is that, if poison was taken at all, it must have been on Saturday morning. It is clear that on that morning his symptoms and sufferings were the same that marked the whole case, and they continued increasing from that time till he died.—There is no proof of any characteristic change, to designate any other point of time than this. There was no time when he began to be sick in any other way; he only grew worse in the same way. If he was poisoned by the malpractice of Bachelder, from ignorance or rashness, he might have begun taking the poison earlier than Saturday. You have heard from Dr. Bigelow that this is a cumulative poison, and when taken in small quantities, dose after dose, goes on increasing in effect, until the last particle is given, the system is overcharged, and life is destroyed. If then Bachelder was administering arsenic to him in the form of that infernal pill, the cause of his death might have begun to operate earlier than Saturday, but if it was administered by himself or his wife, it must have been on Saturday, and if for the purpose of murder or suicide, it would in all probability, have been administered at one time, and in a single dose, sufficient to produce death. It is not suggested, and will not be pretended, that the wife was *feeding him* from day to day with arsenic, to produce a lingering death. We are not apprized of the course the argument is to take in the close for the government, but I can hardly conceive that his death will be charged to have been produced by the gradual administering of poison. If such a process is to be suggested against the prisoner, we not only want motive for the *murder* but for the *mode*, more incredible than the murder itself! What evidence is there that she knew this property of arsenic, in its gradual effect?

If suicide was the mode, then it was probably taken in a single dose, on Saturday morning, at the shop. This supposition will account for all the symptoms and the postmortem examination, before and after death. Dr. Bigelow tells you that if arsenic is taken into the stomach in considerable quantity, it might lie there twenty-four hours before it would all be thrown out. It would rest, by its specific gravity, at the

bottom of the stomach, and there remain till death. All the facts, therefore, correspond with the idea that the poison was taken as early as Saturday morning.

Now where Kinney was Friday night, we are not informed. Miss Collins says he dined at home on Friday, but he was not at tea, and not at breakfast on Saturday morning. Whether he was at home that night, breakfasted early in the morning, and went to the shop, or whether he was at home at all, we are left to conjecture. If he was at home, 'tis a fact known only to his wife. Where was he that night, and did he from the remorse the deeds of that night incited, resort to poison in the morning?

If he did not, how came the workings of the poison in his system on Saturday? Where is it to be traced to the wife? There is no proof, or suggestion of proof of any agency of hers in the whole case, until the giving of the sage tea on Saturday night. Yet the evidence is clear of the effects of the poison on Saturday morning, and there is not a shadow of testimony to touch the wife, until the preparation of the sage tea late in the night. The poison then, if given by her, on this evidence, was given long after the symptoms of poison had been manifested.

The argument, on the part of the prosecution must be, she poisoned him at night, and therefore she poisoned him in the morning. The inference is fair, if the premises are proved; but are they proved? If you believe that she did put poison in the tea on Saturday night, and are satisfied that poison was also administered to him by another hand than his own, in the morning, you would have a right to infer that she was the poisoner in the morning; but you must first know she was the poisoner of the night. If he did it, he could have done it at his shop, on Saturday morning, but there can be no suggestion of proof that the poisoning of Saturday morning was by her, unless they show that she did it after he came home that morning, or unless it is shown that the tea, tasted by Goodwin, was drugged with arsenic. Otherwise to account for the symptoms of the morning, you are driven to the conjecture, that he attempted his own life at the shop, in the morn-

ing, and she in the night, at home, and that his death was the result of the joint design of which they were mutually unconscious. Such an absurdity cannot be entertained for a moment, and yet without proof that the tea contained poison such an absurdity must be supposed to have happened, or she cannot be guilty.

The question then, is narrowed down to this; was he poisoned by the sage tea? Are you satisfied that the tea did contain arsenic, and that it was put into the bowl by his wife with wilful intent to take life? If not satisfied of that, you must then be satisfied she poisoned him in the morning, or the prosecution falls to the ground.

If you fall back upon the poisoning at night, as the only point the charge can rest on, you will require of the government that this fact of poisoning in the tea, must be proved beyond a reasonable doubt. And here you will perceive the importance of caution in weighing the testimony. You must not take the poisoning in the morning to help out the poisoning at night, because it is not traced to her. If there is a doubt as to the latter, you cannot strengthen one doubtful fact by adding to it another doubtful fact. The two cannot help each other; it comes down to a single point, to this particular fact—did she poison that bowl of sage tea to destroy the husband. If the proof fails here, there is no proof in the case.

Now what is the evidence of poison in the tea? The only witness to it is Goodwin; he is the only one that saw it. The tea Dr. Storer saw given, was at some other time, even if Dr. Storer is not entirely mistaken as to any tea, for Goodwin says, and Dr. Storer assents to it, that the doctor was not present.

It rests then, on Goodwin alone, and he stands here in a condition not entitled to credit for accuracy. I do not say he is not entitled to credit for veracity, but the circumstances under which he comes here are not favorable to that accuracy of recollection that is indispensable in a matter of life. He feels that the whole weight of this prosecution rests on him; he is the principal witness, and I am sorry to say it, but so

it is, he who in a public prosecution is relied on to prove the case, is apt to prove it by exaggeration. He has told the story over and over again in conversations with all sorts of curious inquirers, and he now comes here to give the result of the whole, strengthened as it may be imperceptibly to himself, by the suggestions of others. His situation at the time of the occurrence, was not favorable to accuracy. He was watching after midnight with a man dying as he supposed, of that dreadful disease the Asiatic cholera. He is not apparently a man of strong nerves; he had no sleep, and his stomach, from the atmosphere of the sick man's chamber, would probably be in precisely the situation he found it the next morning; and after hearing the incidents of that night, supposed and real, again and again talked over, he comes to give you the result of his recollection.

The most material fact of all is the sediment—least material, in fact, in itself, but having perhaps, the strongest appearance of materiality, because if that sediment was arsenic, all the rest might follow; and yet Goodwin never mentioned this fact till long after the man died. He did not speak of it at the time, he did not name it to those with whom he conversed on all the incidents of that night, and he did not refer to it, though he did to the tea, before the Coroner's Inquest. After he had gone before the Coroner and the Jury of Inquest had returned a verdict of murder against the wife, and not till then, did he tell of the sediment.—How is it possible he should not have remembered that fact, had it occurred?

There is another fact—that sickness of his, which he now seems to connect with the bowl of tea, and which is to make a prominent circumstance against the prisoner; so little impression did it make on him at the time, that in two conversations with Dr. Snow upon the events of the night, he did not allude to it, nor did he name it till it became necessary to look around for evidence to support suspicion. Under these circumstances Goodwin, upon whose accuracy alone, you must rely to convict if at all, comes here to testify. And what does he tell you? Three things—that the tea was sweet, though Kinney requested his wife not to sweeten it; that he

saw a sediment in the bowl, and that he was sick the next morning. The giving of sage tea to the deceased is nothing, and these three circumstances are all. What do they amount to? The tea was sweet. Did the after suspicion of poison suggest that as a coincidence? They had heard, doubtless, that arsenic was sweet, and the tea was sweet though Kinney requested it might not be. Did the suspicion of arsenic suggest the sweetness, or the sweetness suggest the suspicion of arsenic?

You are now told, gentlemen, by scientific men, that arsenic is not sweet. It may possibly have a taste for sweetness after remaining a long time on the tongue, but it has no sweetness from solution. Do you believe then, that the sweetness was from that drug in the tea?

Perhaps the argument may be pressed in another way,—that she had something to disguise, and she sweetened the tea to conceal the arsenic. Let us examine this. What reason have you to believe that she knew such would be the effect? Why would not the sage disguise it as well as the sugar? Her husband had requested it might not be sweet, and she endangered observation and detection or rejection of the poison by the sick man if she gave it sweet. What is there then in the sweetness to support the poisoning?

He wanted the tea not sweetened. Probably she regarded it as the whim of a sick man, and prepared it as usual. That he did not regard it, if it were sweet, is shown, for he did not complain of its sweetness. If this is a circumstance be it so, but what a feather in the scale when weighed against human life!

But the Sediment! Goodwin says that the deceased was thirsty; he recommended some herb tea, she went down to prepare it, was gone twenty-five minutes, came up with it hot, set it on the bureau and lay down upon the bed at the request of her husband. She lay there some time, then got up and gave him some of the tea, said it would not do for him to drink too much and set it down again upon the bureau, and again lay down on the bed. He called again for the tea, she didn't get up to give it, and Goodwin gave it, saw the sedi-

ment and after the liquid was drunk off set the bowl down, and there it remained. Goodwin went to the bureau for water and didn't notice it. Mrs. Varney washed out the crockery that night, she hears all about it now, has heard it before, and yet says nothing and knows nothing of the sediment.

I doubt if there was any sediment in that bowl; but suppose there was, what was it? Dr. Hale shows that you can't use Boston water boiled in a vessel frequently used for that purpose without a sediment. It is like white sand, rolling about, just as this is described by the witness. I ask you if human life is to be put in danger by such a slight circumstance? If Mrs. Varney saw it, she did not notice it at all, and if there at all, it must have been a common and ordinary occurrence.

But sugar was in the tea—Goodwin says it was sweet, and if it were East Boston sugar, the evidence is it would deposit a limey substance; and when it is thus apparent it might have been the water, or might have been the sugar, that produced the sediment, are you to suppose, without proof, that it was a deadly drug? Nothing then remains of the bowl of tea but the *sickness* of Goodwin, and is that anything but the mere nausea of a sick chamber? The whole evidence on this point is very insignificant, and except the sickness, proves as much against Goodwin as against the poisoner. Not that I make the slightest suggestion it could have been Goodwin, but being as strong against one as against the other, it has no strength against either, because without previous suspicion or subsequent confirmation, it is nothing but an intrinsic improbability. They are in the chamber together, the bowl of tea is prepared by her, at Goodwin's recommendation. She has it alone and may put in arsenic; sets it down and Goodwin has it alone and he may drug it. He is a witness and she is the prisoner—he may tell his story and she cannot tell hers. Reverse the case, and is there a fact or motive in this circumstance that touches her, which might not reach him as well? Is there a conjectural motive, as to her? I could suggest a conjectural motive as to him. If you are to proceed upon facts and evidence alone, you

might as well convict the witness as the prisoner. You have only to forget that she was the wife, the supposed motive, though proved a tender and kind wife—you have only to lay this out of the case, and Goodwin stands on the same footing with her, in weighing this circumstance.

Not that I say or would intimate Goodwin did it—it would be monstrous; but why say she did it and Goodwin could not? There are only two suggestions to weigh against her, one that she was the wife, and the other, that she is suspected by public rumor. Leave these out, and I say you may as well convict the witness as the prisoner.

But this is a circumstance, and may go with others to make up a conclusion, and if so, give it the weight it deserves. Suppose then, she had the design of poisoning, and had drugged that bowl, can you believe she would have brought it into the sick room, too hot to be drank? lay it on the bureau, lie down upon the bed, and leave that poisoned bowl in the power of the witness, Mr. Goodwin? Is that credible? You believe her, if you believe that she did this deed, as public suspicion has pronounced her, void of all human feeling; but you have never heard her charged with being void of intelligence and understanding. Yet she must have been so, if she meant to poison, and managed the matter as this testimony supposes. Why not keep the tea down stairs till cool enough. Why not hold it and stir it about till cool, as the man did, (Mr. Bingham) as described by Dr. Storer, and then take the bowl out of the way?

I am aware of a discrepancy there, in the testimony of Dr. Storer, but why not administer the tea in a manner to insure security from detection; why so perfectly careless about it; why give him only a part, and leave Goodwin to give the rest, and not even get up when it was handed to him by Goodwin, and then leave the bowl on the bureau to be seen and taken away by Mrs. Varney, without the slightest precaution?

Well, gentlemen, this is the evidence direct and presumptive on which all the other evidence in the case is to rest,

because if you are not satisfied that arsenic was in that bowl, there is nothing in the whole case against the prisoner.

Let us then examine the other circumstances. For as to this single fact of the bowl of sage tea, I think I am warranted in saying, that the life of a human being was never put in peril, never lost, on such testimony.

It now becomes an important consideration, *where did she get the poison?*

Arsenic is bought and sold, but not as a common article, and its sale would be likely to be traced. Is there a particle of evidence that arsenic was ever in the possession of this woman?

The boy testifies that he sold some to some woman, but when or to whom is not known. He has utterly failed at all times to identify the prisoner. He has been tested and tried, and his denial to the identity is distinct and positive. The case stands as if that piece of evidence was not in it. The suggestion that a woman bought poison, is of itself nothing; you would not at all regard it in weighing an ordinary probability. And that handbill, inquiring who had bought poison, put out on Sunday, and the trial begins on Monday! and yet this mode is taken to satisfy you indirectly that she bought it because no one else did.

The word *poison*, the *hand writing on the paper*, found by Mrs. Varney, is another circumstance. The boy says he wrote poison on the paper he sold. He looks at this and tells you distinctly that is *not* his handwriting. I submit to you that the paper is not apothecary's paper, but candle paper, and the boy declares the writing is not his; that he wrote the word poison on the outside of the folded paper he sold. This is positive evidence against the paper. Examine it. Mrs. Varney says it is folded now as when she found it. Fold it up in the creases, and the word poison cannot be read. Only the letters *s—o—n* appear, and whether the word poison was written before or after the paper was folded, we cannot tell. There is no attempt to identify it with the hand writing of the prisoner, and so far as this goes, it is clear the writing is not hers. It is large, hers is small. There is then no evi-

dence of poison in her hands, and all that has been attempted with this piece of paper, is an entire failure.

I will next proceed to *her conduct up to and after the death of her husband*. She has been followed with great pertinacity; every interview she has had, every word she has uttered, every act she had done; and almost every thought, throughout the whole period of the sickness, the death and the subsequent suspicion, are gathered up and brought before you. We have been able to trace her, almost every hour, from the sickness to the trial, and not only has she come out of the scrutiny unharmed, but it is almost miraculous, that so little should have been found to feed the eager suspicion that followed her. Not one act or expression has been found that is not consistent with her innocence, but what is most remarkable, under the circumstances, nothing has appeared that is not creditable to her.

She went to her husband's shop, at 10 o'clock on Saturday morning, the day preceding his death. Why did she go there? The man was poisoned, if at all, by himself or his wife, that very morning. Did she go to his shop to see how it worked? Does not the very suggestion startle you? Is it not incredible, that having given him the fatal drug, she should follow him to the shop to watch its progress? Why gentlemen, she would have shunned him, as she would that which would harm her most. She wouldn't have dared to look on what she had done. But if he came home late that night, a disappointed gambler, or a melancholy drunkard; if stung with remorse, he lay tossing on his bed, and went out gloomy and desponding in the morning, what more natural, than that this kind and tender wife, as she is abundantly proved to have been, should have followed her poor, repentant, broken down husband to the place of his business, to look after him? If she was innocent it was natural—if guilty, it is incredible. She is a monster, such as the world never heard of. If guilty, her going to the shop was madness; if the deed was his, and she innocent, it was a natural solicitude.

Well, gentlemen, from the shop she gets her husband home. He is deadly sick. Surely if she is guilty and has poisoned

him, she will have the house to herself. No, that day she engages Mrs. Varney to come as soon as possible. Mrs. Varney proposes Monday, but is sent for and comes, at 7 o'clock on Sunday morning. Then there was Collins; she was there on Thursday. (The ladies will excuse me, if I abbreviate their names, it is from no disrespect, only for convenience.)

Collins wanted to be absent on Saturday. She proposed to go to Charleston and pass the night; she a comparative stranger. Mrs. Kinney would not allow her to be absent; she desired her to come back and she came back.

Now look at this. If she meant *murder* would she solicit witnesses? Goodwin was also desired to come at noon, another witness. She sent for Harriet Hosford in the evening, she told the neighbors of her husband's sickness, and more than all, she told it to Dr. Snow in the street, and said if he did not get better she would send for him. Does all this look like guilt?

An argument is to be urged against her, that no doctor was sent for till Saturday evening, when Bachelder came in. The suggestion on this point is, either that she would not have a physician at all, or that she waited for the effect of the poison to work. But why *she* more than he? Who prevented the call of the doctor if anybody did so? She told Dr. Snow she should send for him if her husband grew worse, and yet no doctor was sent for till Bachelder was called in, in the evening, and *by Kinney's request*. It was *he* then who sent for Bachelder and not she. It was Kinney who wouldn't have a physician called in until evening, and then the very one he had consulted in secret the week before. The delay in sending for a physician, attaches to the deceased and not to the prisoner.

Now, if Kinney intended to destroy himself, he would want no physician; if she had destroyed him she would want no physician, but then would she have told of the sickness to Dr. Snow, and proclaimed it to the neighborhood?

It was then his act and not hers in not sending for a physician; he knew his disease was too deep for medicine. Good-

win was sent for at seven o'clock to go for a doctor; he did not come till half past nine, and the prisoner went for Bachelder between eight and nine. Why then was Dr. Bachelder sent for? It is evident that Mrs. Kinney has suspicions as to Bachelder, for when he came she showed him into the room of her husband and said, "there is the man you have given medicine to, and you know for what." I infer from this that her husband had just previously confessed to her the odious disease for which he had applied to Bachelder, and therefore she did not desire to be in the room, or Kinney himself might have preferred to see him alone. When she afterwards told Dr. Storer of this visit, she asked what the man would have been shut up in the room for, except for secret diseases, and she told him she thought there was something very *mysterious* in Bachelder's visit. She then either knew or suspected the nature of their interview. Had she stopped with the word *mysterious*, it might have been urged against her here that she wanted to hint the death upon Bachelder, to conceal her own crime; but she added, "do they see their patients alone, except in secret diseases?"

This shows the importance of a single word in testifying to a conversation or the declarations of the accused. You all know how difficult it is to remember a conversation, and when you examine this testimony, so much of which depends upon the supposed declarations or remarks of the prisoner, be cautious in giving much weight to such testimony.

Dr. Bachelder denies that the door was locked, in his interview with the deceased. That is immaterial. The consultation between him and Kinney, whatever it was, was secret, and all the circumstances tend to show that it was so by Kinney's desire, and that she knew it was intended to be secret.

After the visit, she follows Dr. Bachelder down stairs and inquires if her husband will get well or not. When Dr. Bachelder says he thinks he will, she observes, "Doctor, I don't think he will get well." Why not, asked the Doctor? Because *Mr. Freeman* (her former husband) *died in the same way!* She told this to Mrs. Bingham and so she said to Miss Collins.

She said he is going on just as Mr. Freeman did; he tried to put on his boots to go out, and fainted, and so did Mr. Freeman.

You know, gentlemen, that she had been charged before this, of having destroyed Freeman by poison. She told this to Miss Linnell, for says Miss Linnell when she had the conversation at the shop with Mrs. Kinney about the rumors. Mrs. Kinney said "they accused me of poisoning Mr. Freeman to get Mr. Kinney, and now they accuse me of poisoning him, who am I to get now?"

How would she dare do this if indeed she had poisoned Kinney? How would she dare put the two deaths together, as if to invite suspicion? My former husband, said she, died just as Mr. Kinney died. Would a guilty person thus suggest suspicion, before it was hinted from any other quarters? No gentlemen, nor do I believe she could have said and done so were she not as innocent of the death of Mr. Freeman, as she is of the death of Mr. Kinney. Was it possible that any woman could have brought the two cases together if she were guilty? It would be a degree of audacity, utterly incredible; as if she had said, "my former husband, whom I am suspected of having poisoned, died just as this one died." No guilty woman would thus have suggested the poison of the second husband by referring to suspicions of the murder of the first.

In the evening, when Goodwin came into watch with the sick man, she was alone with her husband. Is there any thing in that? And yet Goodwin seems to attach some importance to it. A wife alone in the chamber with her sick husband? Such are the incidents that suspicion has wrought into mystery in this case. Is it pretended she wanted opportunity to administer the poison, and was alone in the chamber for that purpose? No, gentlemen. But at the several interviews on Saturday evening, when alone with the husband, probably the conversation took place in relation to Bachelder, and also the exclamation of Kinney, which Mrs. Kinney afterwards related to Miss Hosford, "My God," or "O! God! have I killed myself, Hannah, pray for me!" Now this may not have been said

with reference to death by suicide, but by his bad courses. The expression was perfectly natural, if that conversation took place on Saturday evening, when, as we suppose, Kinney disclosed to her that he had taken advice of Bachelder, which induced her to go for him.

But why not send for the family physician? Here is another mystery put to you in the opening. What is the evidence? On Saturday night, Goodwin went up into the sick chamber, when desired by Mrs. Kinney—and was requested to go for a physician. Kinney himself suggested Dr. Ware, Goodwin objected to the distance, and proposed Dr. Lane who was nearer, and went for him, but he could not come; Goodwin then suggested Dr. Storer, which was assented to by Kinney, and Goodwin went for him. This explains why Dr. Snow was not sent for. Instead of contrivance to procure a strange physician, it turns out that the physician Goodwin suggested, and not the one Mrs. Kinney apparently preferred, was sent for. Besides, Mrs. Kinney had called upon Dr. Snow but once, and there was no family physician.

Dr. Storer came at twelve that night, and in Kinney's hearing she gave him a true relation of everything that had occurred, Dr. Bachelder and all. She showed him the medicine, and asked if that could have done the mischief. Dr. Storer thought that it was harmless, he prescribes for the sick man, leaves the house, and she is left alone with Goodwin; and here comes the story of the sage tea which I have already gone over. Goodwin remained till five o'clock in the morning, and then left.—It is important to see who were there, and what trace there is of any attempt at concealment.—Upon Goodwin's going, Mr. Bingham was sent for and came in, and Mrs. Kinney then sent him for Dr. Storer, who had before been called by Goodwin, with Kinney's consent. There is not a circumstance in this whole transaction, except not giving the injection that Dr. Storer had ordered. Mrs. Kinney said she could not give it, and is there anything extraordinary that a woman, under such circumstances, should find it difficult to do it? I need not say much about it. If

they mean to urge it against her, as neglect, it contradicts all their theory for they say she was most hypocritically attentive. Collins then says Mrs. Kinney called up her little daughter to see her father-in-law before he dies. Kinney tells her to be a good daughter to her mother, and from that time till ten o'clock on Sunday morning, nothing worthy of remark occurs till you come to the dying scene. I am not aware that in this detail I have omitted a single material circumstance.

At ten o'clock, when the deceased was about dying, she sent for Mr. and Mrs. Henry Bachelder, whom she had known as friends in Lowell. He came; his wife could not, and he remained there till Kinney died. That dying scene you have heard described by this intelligent and correct witness. I will not go over it, because I am aware that the simple manner in which he related it, must have made a deeper impression on you, than can any repetition of mine. One thing only, I will remind you of: Kinney, though conscious he was dying, expresses no religious hopes. After Mrs. Kinney had whispered to him, he asked the witness to pray, and he tells you, that while this prayer was made, this woman, the wicked author of his death, if you believe the charges against her, sat down by the side of her dying husband, and with murder in her heart, leaned her head upon his shoulder and wept. When he sank away exhausted, and his eyes become fixed in vacancy, she watched his last breath, and as it left him, stooped down, kissed his lips and bade him farewell forever. [The prisoner was obviously and deeply affected here.]

Now, Gentlemen, if that woman is a murderer she is a moral monster, such as the world never saw! There is no sentence your verdict can impose, and no punishment the law can give, that is adequate to such a crime. No, gentlemen; human nature could not compass it, and human intelligence cannot believe it.

Here ends the scene. Next comes in the physician, and wishes to examine the body. If this woman were conscious of guilt, can you imagine the terror with which she would hear a proposal that scientific men should dive into the dark

recesses of her crime, which she knew must contain the certain evidences of that guilt? Instead of this, how natural and proper her deportment. "The Doctors say your husband died of cholera, and we wish to examine the body." What is her reply? She says, I have no objection; it is unpleasant, but I am aware it is proper.

Now, one word of hers would have stopped it, and it was not for want of power to feign, that she did not stop it; for if she be guilty, she is capable of feigning beyond all women on earth. There was no suspicion of her then, and had she said but a single word of denial, the grave would have closed over her victim, and the proof of her crime, forever. A single remark may be pressed here. After the examination, she asked the Doctor of what he died. He replied he couldn't tell. "Yes," said she, "George has been sick some time, but he died of some complaint you know as little of as I do." Was this anything more than a sort of soliloquy, a thinking aloud? The doctors don't know, nor do I know; was it disease, was it remorse, was it suicide? All this may have unconsciously passed through her mind.

She was scarcely got through this trial when the doctors came back again. They tell her we are not satisfied, we want to examine further. Surely then was the time for guilt to have prevented farther research into its crime, but not a word of objection is said—go and examine again.

Now, gentlemen, there is but one explanation of this—her innocence—unless her conduct is to be accounted for by no rules ever known to have governed the human heart.

That day Harriet Hosford saw her, at three o'clock, and she said she had lost her best friend, she had no tie on earth. Did she say this to blind Harriet? A moment after, she says, "perhaps he was taken away in mercy after all, for he often was as you saw him that night." Then she first disclosed his habits of dissipation, and added, "no one knows what I have suffered the last summer." Is this anything but the natural incoherence of grief? First she speaks of her loss, and then of what she had suffered in secret. Is not her suffering con-

sistent with tenderness to her husband?—for she had been kind to him, as all the evidence shows. Why then should she be inconsistent if it were not the sometimes apparent inconsistency of truth? If capable of feigning, to the extent this prosecution assumes, surely she could feign consistently.

This brings us to the time of the funeral. She slept that night with Miss Collins, and went over some events of her life, but nothing material to this case. In the morning she went to the grave of her husband; you have heard Miss Collins relate that incident, and you must say it is all natural and affectionate; consistent with all you have heard of the harmony in life between them, and if you find it consistent with true grief for the dead, be cautious I beseech you, how you receive it from the other side as an exhibition of monstrous hypocrisy! From the grave she went to the shop where her husband had been.

I will now remark upon the request she is said to have made to Dr. Storer on Tuesday, for a certificate that her husband died of cholera. If the statement be true, the *time* is very material. Dr. Storer states that it was on Tuesday, the day after the funeral. That Dr. Storer is a correct medical observer I have not a doubt, nor do I in the slightest degree call in question his veracity. But medical men, who in a professional examination would observe medical matters minutely as of great importance, would regard with comparative indifference minuteness of time in the application of evidence. That Dr. Storer has unintentionally made a great mistake here, I hold to be certain. At first he was doubtful as to the time, and vacillated between Tuesday and Wednesday, or some other day, and he finally settles down upon Tuesday, the day after the funeral. But in a matter so material as this, the time is most material, I doubt his accuracy from his fixing it on two several days, Tuesday and Wednesday, and then settling down upon Tuesday; and also from the fact that he first testified it was Miss Collins who called on him at a given time, and then he comes on the stand and corrects it, not from his own recollection, but because she has since told him he was

mistaken. He also stated that Miss Collins called on him on Thursday, but he is now satisfied that she was sick on that day, and could not go. So he swears that the sage tea was given by Goodwin, when he, Dr. Storer, was present; and that Goodwin sat on the bed and stirred it till it was cool. After he goes out of the Court room, Goodwin tells him, that he (Dr. Storer) was not there when the tea was given, and then he comes back and desires to correct it, and says it must have been some other person whom he saw give the tea; so, if this be true, the tea was given twice. At first I supposed it was Bingham, who gave the tea at the time Dr. Storer was present, but I was reminded by the Chief Justice that Bingham did not go into the chamber with Dr. Storer. It must, therefore, be entirely a mistake, that he saw any man administer the tea; and yet Dr. Storer states it confidently at first, and then comes into Court and corrects it, not because he now recollects it differently, but because Goodwin tells him it is not so.

Now then, how is he entitled to tell you positively that the visit he made Mrs. Kinney was on Tuesday when he mistakes in so palpable a fact as to a person being present when the tea was given? I charge no intentional misstatement here, but such is human recollection, and human testimony is most frail and unsatisfactory in the mere recollection of times and words. It is not certain that the interview of which Dr. Storer speaks was even that week of the death.

That it was not on Tuesday will appear from other facts in the case. Dr. Storer tells you that Miss Collins brought to him a line from Mrs. Kinney, requesting a call; that he went, saw Mrs. Kinney and she then asked for a certificate that her husband died of cholera.

Now, perhaps of all the facts testified to about this lady, this at the time it was first stated, was the most striking. The evidence does not show that she had heard of the reports of poisoning on Tuesday; and here was a woman who did not know of these reports, or that poison had been found in the stomach; disturbed by guilty fears and the terrors of remorse, sends for the Doctor to get a certificate of death by cholera,

and gives as a reason, that she was pointed at, at the funeral, as the murderer of her husband!

How could she do this, if she were not conscious of guilt? That is the argument, and I am ready to meet it.

Suppose she had not heard of the poison, and that it was Tuesday. She knew she had been accused of the murder of a former husband.—She saw a crowd of people at the funeral, and you must be well aware how they looked, when you have the fact of the suspicions that were afloat in that crowd. She sent for Dr. Storer who had told her that her husband died of cholera, and asked him for a certificate of that fact. She said she wanted to unbosom herself. Can you believe that this woman, firm as she has been throughout, whether innocent or guilty, sent for Dr. Storer to make him the confidant of her guilt? No! She spoke of her former husband, and she says, “I have been accused of the murder of my former husband; Mr. Kinney has died much in the same way, I am going to his friends, and I want a certificate of the cause of his death.” Now if she were guilty, would she have been so foolhardy as to ask a certificate of the Doctor which she knew was false, and knew that he must know it? But was it not natural that she should ask for it, if innocent? Judge you if she was capable of the folly of disclosing her guilt, if she were capable of the concealments and contrivances that she practiced provided she committed the crime.

What had she to disclose? Here *words* are all important, and I have not that confidence in the accuracy of Dr. Storer’s recollection of conversations, to suspend the life of the prisoner upon it. I have but a suggestion to make. She had some suspicion of the death of her husband either by suicide, or from disease or malpractice, but it seems to me she then began to suspect suicide. You have heard his expressions to Tucker and others, and is it strange that hints like these should have fallen from him to the wife? Feeling thus she sent for Dr. Storer, perhaps to disclose her suspicions, and make inquiries of him, as to their probable foundation. If it were so, the course the conversation took in that interview was

entirely natural. She began the conversation probably with that object, but wandered from it, talked incoherently and ended in making no disclosure of her fears. The fair inference is, she had something on her mind she could safely disclose to Dr. Storer, yet felt reluctant to do so, and that, in what she did say, she spoke of the former rumors of poison; and not the new ones.

But if there is a mistake here in Dr. Storer's testimony as to time, it presents a distinct refutation of any inference against her.

Who went for Dr. Storer on Tuesday, if that was the day? For he had this interview immediately upon a message sent to him from Mrs. Kinney. It was not the little girl, for he admits he never saw her. It was not Miss Collins, for she has told him so, and he has corrected that. Who then was it?

Now if the messenger was Miss *Linnell*, the whole matter is explained, for Miss Linnell did not carry a message till Thursday.—She had told the reports to Mrs. Kinney, and Mrs. Kinney then sends for Dr. Storer, to obtain a certificate.

Either way, you cannot turn that interview to her discredit, without supposing her bereft of understanding, which all the evidence repels.

Thursday morning there was another remarkable occurrence in this history—THE BREAKFAST; I call it remarkable because they do. I am not aware how it is to be used in the close, collectively, individually or circumstantially.—And here I feel bound to say, because I stand here for the life of a prisoner, that the Attorney General has been asked at the Bar, why this piece of evidence was brought into the case, and to what end, and the answer was, that when we hear him in the close, we shall know. I am sorry he puts it off till then, for then we cannot answer; nor do I think it fair, or just, or merciful, that an argument which may be reserved by a prosecuting officer—be sprung upon a prisoner after the mouth of his counsel is closed.

I have heard the request, to state the purport and intent of evidence, again and again made in civil causes where only

money is at stake, and I never knew respectable counsel to refuse it. In a case involving life and death, such a course, I must say, is unprecedented.

Are we struggling here for victory? Why, if not, are we left in the dark, as to the bearing this piece of evidence is to have, in the close of the cause? I can only guess at it, but I ought not to be left to conjecture a reply to what I may guess will be the argument. I ought not to be, nor do I mean to be unjust to the Attorney General.—Doubtless he discharges the high duty of his office as he understands it, but I have only to say that if it be one of the duties of that office to withhold from the request of counsel the purport of evidence where a prisoner's life is at stake, *I thank God I am not obliged to hold it!*

Mr. Austin—Upon such an accusation I claim the right to be heard. I will state to the Court what the learned counsel very well knows. I did offer last night to give him in writing the whole of the argument I should make on that point, if he would tell me himself, or would state in Court, this morning, that he did not understand the fair import and bearing of it, from the evidence itself.

Mr. Dexter. I am glad the Attorney General has made the explanation. It enables me to answer him. I did go to him last evening and told him that his course was improper. I moreover told him that one of the oldest counsellors at the bar had said to me that his conduct was unprecedented. He then said he would give the information if I would ask it of the Court, but not if my colleague asked it. Gentlemen, I will not submit to any disparagement of my colleague in this cause, eminently able and honorable as his conduct of it has been. I will not consent to any thing that may imply a censure of my honorable colleague. I wish not to draw anything personal into this case, but I will not ask anything of the Attorney General that he will not give to my colleague. Here let it rest. I shall endeavor to meet the line of argument he may take as I best can, but if any course of argument is taken in the close, which I do not anticipate, I shall stand up here and ask to answer it, and I know that after such a request and such a refusal, I shall be permitted to do so.

[*Mr. Dexter* then went into a condemnation of the supposed inference from the Thursday breakfast. This was that it would be urged the prisoner had put arsenic into the breakfast of Thursday, to cause a general sickness and raise the impression, from symptoms similar to those with which Kinney died, that the cholera was in the family: or that it was accidental, from the poison used on Saturday night having remained in some of the vessels, and thus have become accidentally mingled with the breakfast of Thursday morning. Either supposition he showed, could not hold; that there was not sufficient evidence that the sickness was not caused by the materials of that very extraordinary breakfast, and that there was no proof that arsenic was used at all, or if used, that the prisoner had any more to do with it, than the witnesses.]

Then comes in the blue paper, marked "poison," and that is to be connected with the apple sauce, which it is to be *supposed*, contained the poison. I have only to remark upon the extreme folly of leaving the apple sauce in the sink and throwing the paper down beside it, marked poison;—together with another improbability, that Mrs. Varney should pass by the sink and see no blue paper, when she went to gather waste paper, to kindle the fire—go behind the door, collect the papers and return, and then when she went to kindle the fire, discover the paper. I am not bound to explain it, but I think it obvious that this blue paper was with the waste papers behind the door, and that Mrs. Varney gathered it up among the rest of a handful, and dropped it in going to the fire.

But how came that paper in the house? The answer is simple. We all know it is common to keep poison in houses for killing bugs, and it may have been the label of a bottle. That is sufficient to explain it for all our purposes.—There was a startling thought crossed my mind. Was the paper placed there to supply a link that might be wanting in the chain of evidence against the prisoner? That indeed, would be a horrible suspicion, but no more horrible than that a wife should murder a husband without motive. Dr. Hildreth while on the stand, related that when they were hunting up the evidence, the Attorney General declined moving in it unless it was more conclusive, and I was startled to hear him say that the Attorney General told him that if it could be proved that the prisoner bought poison, or that a paper marked poi-

son could be found in the house, he would move in the case, and at that time the witness had not heard of this blue paper. —Where did he get the suggestion? I am confident not from the Attorney General. He has contradicted the witness on that point, though the witness still persisted in it, but I do not believe that such a remark was made by the prosecuting officer. But mark, Gentlemen, the paper was found. I did not cross-examine that witness because I did not think that in the disposition he was in, that course could be of any benefit to the prisoner.

We have now traced the prisoner down to her trial. If guilty, is it possible that she should not by something have implicated herself?—and yet I cannot perceive that there is a word we might wish had not been said.

How did Mrs. Kinney take these reports when she heard them? This is the most dangerous part of the testimony, and is to be received with extreme caution.

On Sunday, Drs. Storer and Jackson, for the first time told her of the poison in the deceased. Her answer was, “INDEED?” Dr. Storer seems to distrust the answer; but how much depends upon the *tone*. But if you suppose as I do, that this fact came in confirmation of her secret suspicions of suicide, then *indeed* was all she could say. Afterwards, on the same day, she sent for Dr. Storer, and wanted to know how the poison came there. Dr. Storer asked “could *he* have done it?” Then, were she guilty, was an opportunity for her to have thrown the blame on the deceased, and screen herself from suspicion. Instead of this, and as if to cover up his memory from the stigma of self-murder, she said, “No, I don’t think George could have done it!” Had she been guilty, she would not have lost this opportunity to throw it on him.

But she did not tell this to Miss Collins, and she seems hurt that Mrs. Kinney did not make her a confidant. I am not surprised that she did not tell it to Collins. I should have been surprised if she had. I think, gentlemen, you must make some allowance for the phraseology of that young lady. Much is to be abstracted when she gives the conversation of others in

her own language. Without the slightest disposition to misstate, there may be a strong propensity to embellish. I can make but little of all this detail by the witness of conversations and exclamations. They might be something, they may be nothing, and they cannot weigh a feather here against the prisoner. Let me again caution you not to receive this and other suggestions, such as the sending the little daughter out of town, and going herself, or the conversations at Thetford—as if to confirm your suspicions; but look at her as an innocent person and then say if you see in all this, any marks of guilt.

But if she did it, where is the *motive*? From the days of the Roman Orator until now, in all causes of guilt to be proved by circumstance, the question has been, as it is now, “*for what purpose did she do this?*” and if the answer be wanting in evidence, no jury can supply it. A Jury should never convict on circumstantial evidence without *motive*. All the evidence shows there could have been no motive. He had great failings, but she was eminently forgiving. I ask you then, why she has done this? Is it credible? I cannot conjecture where the Government will pitch for a motive, and I have looked through all the case. She discovered that night, that he had a disgraceful disease; one that involved infidelity to her, and from mere jealousy, revenge or fear of contagion, she determined at once to take his life! This must be the theory, but what is the evidence? There is not a particle to support such a conjecture. The symptoms of this disease were of a secondary kind, showing it was of remote origin, and implying no infidelity to her. And if recent—it must have been known to her before. He stated to Bachelder that it had long troubled him. Besides, she discovered this fact on Saturday evening, and the man was poisoned Saturday morning, before she knew it! Where then is the motive, or the possibility of even the *conjecture* of a motive?

Remember, again, we are not to show how he died. But how did he die? If not destroyed by Bachelder, he died by his own hand. It will be said, he died in silence; that he

could not have done so, and kept his secret locked in his heart. But it was a secret crime. He was a man of resolution, quick, and determined. True, they say he expressed, in his extremity, anxiety for relief; yes, relief from pain; but not a wish was expressed to *live*. He desired no medical aid, till it was urged on him; he said nothing of religious hopes or fears; he died in sullen silence. All he said was, "where shall I be buried; no matter where;" and that was all, except that he desired to be buried under arms; a very unusual request for a dying man. Was it that in the eclat of the funeral, might be concealed the secret cause of his death. He was poor and proud, he was a gambler, intemperate, ruined, and he suffered keenly from remorse. Gloomy thoughts gathered upon him. He was a changed man to his old companions; he had contemplated death by his own hand, and he told Tucker that he once attempted it by laudanum.

Such was his temperament. The idea of suicide had long been familiar to him, misfortunes had been accumulating and pressing him down, and at last came one drop that made his cup run over. He found the effects of former vices returning upon him in a disgraceful disease. Then it was that he carried into effect the purpose that he had in his mind, when he told Tucker not to be surprised if he should hear at any time that he laid violent hands on his own life.

This is the evidence, gentlemen, and there is more proof in the case of suicide than of murder. There is motive enough for suicide, there is none for murder. Gambling and drunkenness have had their thousands of victims by self-murder, and many men have fled to death as a refuge from the shame and misery of that odious disease which was upon him. Suppose, gentlemen, it were proved to you that Mrs. Kinney had said she was tired of him and resolved to take his life, and had once attempted it and failed. What would you say then? And yet you have had that evidence of the suicide of the deceased. If she had said so, she could not have escaped your verdict.

I have now said all I proposed and more in detail than I

intended. I now leave her to you. In the great hand of God she stands, and through Him she looks to you for DELIVERANCE.

CLOSING ARGUMENT OF THE ATTORNEY GENERAL

Mr. Austin: Gentlemen of the Jury. When the Grand Jury determined to present this case as a proper subject of judicial investigation, it was obvious they were about to devolve a most arduous task upon the prosecuting officers which none, not in love with labor, could desire to perform. It was easy to see that the tide of public feeling, if its current had ever borne against the accused, would as rapidly roll back again when it was found that in the imprisonment previous to trial, and the physical suffering in the progress of it, the prisoner would endure more than enough for *suspicion*, and almost enough for *guilt*.

To those of us, gentlemen, who have some experience in these proceedings, and who know the extreme difficulty of arranging a case of circumstantial evidence to the satisfaction of a jury, the increased and inherent perplexities of a capital cause and the accumulated and almost insuperable obstacles which the humanity of the one sex presents when one of the other sex is the party accused;—nothing could be less desirable than the necessity of conducting such a prosecution.

But from the obligation thus placed upon us, there was no honorable way of escape.

In the full knowledge of this obligation and with a deep sense of my responsibility, I have endeavored to place before you all the legal evidence, and no more than the legal evidence, that has come to my possession. I shall endeavor to apply this evidence to the weighty charge that hangs over the prisoner at the bar, and to treat it in its connection with the evidence and arguments of the prisoner's counsel. The result of the investigation is with you. The Commonwealth cannot contend for victory, for there is no verdict carefully considered and honestly rendered by an intelligent jury, that can ever be defeat.

The interest of the whole public is concerned for each and

every of its citizens—to punish the guilty not more than to protect the *innocent*. But it is in the very nature of trial that the suspected, whether guilty or not guilty, should be placed at the bar. It is for the vindication of the law and the justice of the country, that this trial should be freely, fully, fearlessly conducted—that it may never be said or imagined, that one person is acquitted by favor or feeling, and another convicted from indifference or passion—that it never may be said those impulses of the public mind which sometimes would arrest and arraign without proof, and again acquit against evidence and reason—prevail over the calm, deliberate, sober judgment of the community.

Providence in its mysterious dispensations sometimes involves the innocent in suspicion of guilt; as it afflicts them with poverty, bereavement, or disease; and allows the guilty to escape an accusation with all the pride of beauty and the blessings of existence. This vicissitude is not to be complained of, for it is the decree of Heaven. But it would be an insufferable addition to the seeming evil if all human means were not enforced to place the one and the other in that position, where, according to our notions of justice, both ought to stand.

The Counsel for the Prisoner have presented you one side of the case. It is my duty to offer you the other; and yours the important and responsible privilege to determine what decision ought to be pronounced. Of that decision whatever it may be, no one can have a right to complain, and least of all will the officers of the Government *desire* to complain.

The counsel for the prisoner have given you their opinion, as to her guilt or her innocence. The counsel of the Government will do no such thing. They will only present to you this case so as to enable you best to judge of both sides of it and having done this in the discharge of my official duty, I shall have nothing to regret or complain of, whatever may be your determination.

It has been opened to you as a case of both positive and circumstantial evidence. It is denied for the defense, that there is any positive evidence in the case; but to my view, it is both

positive and circumstantial. The humanity of the law requires that no party shall be put on trial for murder until the death is proved; and we offer positive evidence of the death of George T. Kinney.

I had also supposed that nothing more positive or direct in proof, could be given than the evidence that the deceased died by poison. The scientific physicians who examined the whole case, tell you that in their opinion he died of arsenic. But more than this is required, and the evidence goes farther. The drug shall be found in the body of the dead man, to bring the charge of poisoning; and, if found, the inference is then clear that poison has been taken, and has produced the death.

There are, also, symptoms of the disease before death, which the prosecution must show, and these pillars of positive testimony bear up the arch that sustains the circumstantial evidence, and the direct inference upon which the Government rely in this cause.

I need not detain you a moment, to show that all the evidence proves that the symptoms were those of poison by arsenic; and the opinion of the medical men is, that though the symptoms are common to cholera and poison, this was a case of death by poison, and not by cholera.—I know the medical evidence has been attacked, but the witnesses who sustain it have armor of proof to defend themselves, that requires no aid of mine. You will not doubt, gentlemen, that the contents of the stomach were honestly dealt by, because there was no possible motive to tamper with them.

I then lay this down as the corner stone of the prosecution, that the deceased came to his death by the poison of arsenic, and if the ingenuity of the counsel for the defense could attack this stone wall, and with so much plausibility you will judge what is the efficacy of his attacks on the other main positions of the case.

If you doubt this fact there is an end of the prosecution. If you believe it, we then come to another position. It is indispensable to show not only that the act was done, but that

the prisoner wilfully did it, and if this is not shown, there is also an end of the case.

But if the Government are to prove that in no other *possible* way this death could have happened, then the case might have ended where it began, and all inquiry or trial in any cases depending on circumstantial evidence, become utterly useless. No man would stand here and say that by no possibility it was suicide. No one could say, that by possibility the deceased might not have that morning taken a glass of soda, and arsenic been in it. If, in short, you are to be limited to a question of possibility, the prisoner must be acquitted; and that is not all; no other man or woman should ever be put to that Bar for the charge of murder by poison; you may strike that crime from the Statute Book. The prisoners you arraign for such a charge, may sit through the trial with the calmness of a marble image, without stirring a pulse or shaking a fibre of their frame, for when the mockery of a trial is begun the certainty of acquittal has arrived.

I hold for the protection of all our fellow citizens, that this doctrine of possibility is to be scouted from the case. I do not say that you are to convict on mere probability; the proof you are to require must carry with it conviction beyond a reasonable doubt. But I do not propose to say a word upon the law of the case. It would come with little weight from me if contradicted by the court, and I have no intention to advance any doctrine of evidence that they might not approve.

I put the case to you, on the evidence, as men of common sense and not of extraordinary learning, for in the trial by jury, it is to men of good sense, drawn from the whole community, that all matters of fact in controversy must be submitted.

If I rightly understand the argument of the opening Counsel for the prisoner, he gave you various modes and hypotheses by which the death might have been caused, you were not required to believe all or any of them, and yet if either of them was possible, then the Government's hypothesis of murder is to be taken as not true. Then take all these hypotheses and

that of the Government with them, and if you believe none of them, of course there is nothing to believe, and there is an end of the case. But examine all successively, and when you can find one you can rest upon, *that* is to be taken, whatever may be the consequence; but if none can be relied on, then the prisoner is entitled to her discharge.

We start with the fact that the deceased died of arsenic, and it is equally clearly proved that not less than ten grains were found in the stomach. True, the test applied by Dr. Gay did not produce this quantity, but if all the contents of the stomach had been analyzed, as was that portion in which the poison was detected, a like product from the whole would have amounted to at least ten grains. But this is not all. The deceased was subjected to severe vomiting and purging, after the arsenic was taken into the stomach, and much of the poison must have been carried off by that process, and you know it was the remaining quantity that actually killed him, by absorption into the system.

If then, ten grains were found, after this escape and absorption, how much was administered to him, by himself or by some one else? At least ten times that amount.

I put it then, not only that he died by arsenic, but that by calculation from the ten grains found in him, he must have received at least one hundred grains into the stomach. Sit down then if you please to give the case any consideration in the Jury room, and first ask what was the real quantity the deceased took and held in his system. I estimate it at one hundred grains. One hundred and twenty grains is three cents' worth, or a quarter of an ounce. Settle it as you shall judge; come to the minimum; take into the account the spasmodic appearances after death, making him, by a convulsive force, almost live when he was dead; and when you have fixed upon the quantity, let it be settled as a data, and then proceed to the next, and ask if that poison was administered by the man they have stigmatized as a quack, from the want of a medical degree.

I do not stand here, gentlemen, to defend irregular practice

in or out of Court, but if the witness Bachelder is to be tried on any such charge, it is not here. I confess, that if I required a physician for my family or myself, I should greatly prefer Dr. Bigelow to Dr. Bachelder, but that is a different question from the one before you. The question is, did Bachelder poison the deceased? He is a witness, and he states to you certain positive facts. Is he to be believed or not? It is a question of veracity, not of medical degrees. It is not the practice of the Government to assume perjury in a witness, we leave that to honorable gentlemen of counsel for the defense. We do give credit to human testimony, when unimpeached and uncontradicted, and this is the instrument the Government has placed in our hands, for the purpose of managing its causes.

Bachelder testifies that on Monday Mr. Kinney consulted him for a certain disease, and that he gave him a cathartic and a box of blue pills, and nothing else, and never saw him again, until *after* the time the counsel fixes, (and I agree with him) when the poison was taken by the dying man. The arsenic then was either in the blue pills or the cathartic, if Bachelder gave it. This was on Monday, and the deceased was not under the influence of poison till the following Saturday morning. Now when did it develop itself? He had one hundred grains in his stomach, and the symptoms did not show themselves till Saturday. If he had taken poison from Bachelder on Monday, it must have developed itself sooner. It is said to be cumulative, but no man can take with safety, more than the seventh part of a grain in a day, and in seven days he could have got but one grain in these pills, and how long would it take to get into the system? It is a cumulative remedy, and, says Dr. Bigelow, we begin, when using it as such, with the sixteenth part of a grain. I beg you to look at it mathematically, as well as rationally, and see if the poison the deceased took could have been contained in the medicine given by Bachelder. This is the clear conclusion against that hypothesis if you believe the testimony of Dr. Bachelder. But they bring Dr. Harrington, *par nobile fratrum*, to confront him. They are now rivals and each has set up a hot shop of

health, on his own account. But Dr. Harrington says that the very pills Bachelder prescribed were the syphilitic pills he shew to Mr. Lane, and that there was no arsenic in them, and that Bachelder told him he never used arsenic in syphilitic pills. By all the proof in the case, therefore, whatever Bachelder may have done in other cases, he stands free in this case, from the imputation of having administered arsenic in the pills or the cathartic, from design or malpractice.

After this, but, as we all agree, after the deceased was poisoned, Mrs. Kinney came for Bachelder, on Saturday evening, and he then gave his bowel pill, or as he more learnedly calls it, his mucilage pill, which he tells you contained no arsenic, but mercury and slippery elm.—But this was not the poison the sick man had taken, for the fatal dose was given on the morning of that day, except what was in the sage tea; and it is probable that Bachelder when sent for, would prescribe laudanum, when, if this theory be true, he knew he had already administered arsenic? Would he have done this unless he had the vision of the gallows before him, and wanted to walk up to it?

Dr. Storer, when he learned an irregular practitioner had been to the patient, inquired for the medicine and examined it. Dr. Bigelow also examined it, but they found no arsenic. Dr. Bigelow thought it an imitation of Dover's powders, which never contains arsenic. The counsel asked Dr. Bigelow the curious question if arsenic *might* not have been in that powder? So if you see a tumbler of water poured from this pitcher, you might be asked if arsenic *might* not be in the pitcher, and you must answer as Dr. Bigelow did, that it possibly might be; and here I say, what I have said all along, that if what *might* be, is to be considered evidence, then it is worse than useless for you and the learned Judges to sit here to try this cause, or any cause at all.

But another hypothesis for the defense is more likely to find favor, which is that not intending to give poison, as a remedy, Dr. Bachelder mistook and gave it for something else; and they tell you that when Bachelder came there and was

told that the patient was worse, he examined the pills, and from this they infer that he might have made a mistake, but when he did examine the pills he said all was right; so that he did just as any one of the medical faculty would have done, from the President to the scribe, by recommending a sedative in the form of laudanum. Now were it possible to put Dr. Bachelder in the bar, and charge him with the death of this man, I am sure you would not leave your seats before you would say there is not a shadow of evidence to implicate him in this homicide.

There is a vastly more important question, gentlemen, for you to consider, and that is, that if this arsenic, in the supposed mal-practice of Bachelder, does not exist, there is a small line between the prisoner and the death of the deceased; but it is necessary to get rid of that before we come to the defendant.

The great obstacle raised to the conviction is, that Mr. Kinney poisoned himself; and here let me ask you to observe how ready they are to accuse all whom the law does *not* accuse. To them all are guilty except those whom the Grand Jury indict, and failing in the attack upon the irregular practitioner they put the dead man at the bar, when the grave has closed his lips, and there is no one to speak in his defense, and this they call the humanity that shames the Counsel for the prosecution.

But how is the alleged suicide shown? There is no *positive* proof; no one saw him do the deed, or heard him avow it; and the accusation is attempted to be sustained, by the *feeble* evidence called circumstantial, which is strong and irresistible when used on the side of the defense, but which, when applied to the prisoner, is like gossamer blown away by the breath of the counsel. Against the dead man who has no counsel, it is to be strong as cable; against the prisoner, defended by all the eloquence of her counsel, it is a whisp of straw; I am willing to meet it.

You are called upon to infer that the deceased poisoned himself, 1st because of his habits—2d, because ruined in property

—3d, because gloomy in his disposition, and 4th because he boasted, or bragged, or threatened he would take his own life.

The counsel for the defense tell you that in circumstantial evidence, the facts are to be proved, and the inference must be a fair, logical deduction from them. I shall not dispute the position. Whence do they derive, or how establish the facts? The secret thoughts and private acts of the deceased, his days of labor and his nights of ease, the difficulties, despondings and the failings of a whole life; and all that may be treasured in the memory of a wife, are disclosed to the counsel and laid open here; but taking all, I ask you is there any ground to believe, that if like some Eastern nations who hold a jury on the dead, this man were charged with suicide, it would be possible to find a verdict of guilty against his memory?

To call him a gambler, is speaking of him in hard terms. He occasionally played at games for small sums, but the use of cards and games, at a convivial party, however it might be disapproved by the learned clergymen who sat on your right, Mr. Foreman, this morning, is extremely different from that habit which gnaws like a moral cancer on the desperate man, and makes him raise his arm against his life; and the disposition that would magnify amusements like these into the vice of gambling, belongs to the *future* Attorney General of the Commonwealth, and not the present. The accusation is harsh, and cruel, and unjust, come whence it may, or strike whom it will.

The most important witness is Tucker. You would have supposed from his answers to the question how he came to be a witness, that he came here because he could not help it. How does it turn out? He had written a letter to Mr. Riley offering himself as a witness, and was then promised his expenses for coming here. This is equivocation with a circumstance, and with this we begin our acquaintance with Mr. Edward L. Tucker.

The question is, was it a cause of embarrassment in his affairs, did he leave a single gaming debt behind him? He told Leach expressly that his affairs were embarrassed by others,

and we know who they were; he had two partners, and both left him in the lurch. Let me not be misunderstood. I have no wish to extenuate the conduct of a man who neglects his business for the pursuits of pleasure, or spends his time in amusements or games, when it might be better employed; but let not this fault be exaggerated into crime, and this little degree of departure from the conduct of an industrious man, stretched to the extreme of profligacy and gambling. Do not visit so unjust a judgment upon men who thus occasionally indulge in the pardonable hilarities of the time.

It is said, as another proof of suicide, that he was in bad habits in respect to drinking; and I supposed from the opening, you would have found him a common drunkard, escaping from the House of Correction only by the forbearance of his friends, or the mercy of the public officers; but there is nothing like it in the evidence. On this point, too, there is much of exaggeration, to transform slight failings into a fixed habit.

I do not know, gentlemen, but what it is best to drink nothing but water, and I have no doubt there are men among us who, if they had the making and executing of the laws, would hang and quarter every man who should drink a glass of alcohol; being, in their zeal for temperance, the most intemperate men in the world; but, when we speak of intemperance, especially intemperance that would incite to suicide, we mean an habitual intoxication, amounting to the vice of confirmed drunkenness. Such was not the character of the deceased, and hence he was not the dissipated and broken down man the counsel must prove him to have been, before they can draw from these premises an inference of suicide.

But his property was torn from him and this drove him to suicide! Stripped of all imagery, it amounts to this; that a man who had a good trade and worked at it, but had not the means to buy a shop full of stock, was a poor man, and therefore a reprobate, and must commit suicide! This is the argument from the kind and generous counsel for the prisoner!

The best answer to this is, that he never would take advantage of the insolvent law, which would have relieved him from

all his embarrassment. Besides, his friends were ready to supply him with stock and lend him money. Barnes says he was getting on better just before his death, and he had got over the most humiliating trial to a poor and proud man; he had been to jail and taken the poor debtor's oath, and he did not resort to suicide then.

This is the evidence that the deceased sought his own life. Taken all together, was there any approach to an accumulation of evils that should have overwhelmed him?

But a great deal is made of the threats of suicide. What do they amount to? On a sealing voyage, twenty years ago, he looks at the water and threatens or thinks to jump in. Whether he took his coat off does not appear, but if he did he cleverly put it on again, and he came home from the voyage safe and sound.

No man threatens suicide who means it.—You never knew a man boast of a deliberate purpose of self-murder; it is a purpose locked in a man's own heart, and you might as well expect the thief to tell the Sheriff he meant to break open a bank, as for a man to say to another that he was about to break open the treasure of his heart and let out his life.

What is there against this presumption of suicide, for you are trying the evidence now on that point, and you must not make it a guess that he committed self murder. If you do, that is your affair and not mine. I say then, after having considered this flimsy pretense of suicide, I ask you next to examine the presumptions against it. What are they? The evidence from the prisoner herself. If he did contemplate or commit suicide, who knows it best, the counsel or the prisoner? And here I think she is to be bound by her own words.

The first you hear of this, is in her interview with Dr. Storer, no matter for this purpose, where that was, and the Doctor asks her if the act was not done by himself—and then, she who knew him best, in gloom and depression, in sickness and in health—she says: "*No, George could not have done it.*" If this exclamation, so uttered and so given, be true, it is

worth all the other testimony on this whole suggestion of suicide.

Again, when Miss Linnell says to the prisoner, "you are wonderfully supported;"—"yes," was the reply, "I have every thing to comfort me!" What, the wife of a husband dying by his own hand, every thing to comfort her! Surely it meant, and she who uttered it must have felt, that he did *not* die by self violence.

As another proof of suicide it is urged that he was affected by an odious disease. But was that its first visitation, to drive him to suicide from shame? No; it was confessedly secondary, so that it seems he did not kill himself when he first discovered it, and would he, on the breaking out of secondary symptoms. That he desired health and sought recovery, are certain, for he applied, not for arsenic, but for medical advice; and this he must also have done on its former appearance, for he had been partially cured, and when it appeared again, he again took means to get well. According to the opposite theory then, he was doctoring himself at the same time he was preparing to take his own life. Was he in his own opinion getting better or worse? Better surely, for he had asked Mr. Barnes to come and take a walk with him round the Common, and would he have done this if he then *knew* he had taken poison enough to kill himself? Besides, he had arranged to go into the country, nor is there any sudden thing shown to have occurred that should have caused him, in a moment of desperation, to commit the act.

Was there anything in his domestic relations to lead to it? It is certain that whatever was her regard for him, of which you hear but little, *he* was devoted to her; there was nothing at the hearth or the bed, of domestic grief: to the last moment he regards her with affection, and as he takes her by the hand, says, "Hannah, you have been to me a good woman."

Now would this man have died in silence, poisoned by his own hand, leaving this wife, whom he knew, (though he believed unjustly) had been charged with the murder of her former husband, in the same way—I ask could he have done

so with all this affection for her, to the last, knowing, as he must have known, that if the cause of his death should be detected by medical men, it would arraign her at the bar, to answer for his life—would he, nay, *could* he have so died, and not disclose the cause?

Again, did he desire life, or did he walk willingly to the grave? He sent for physicians, they applied remedies, and the dying man stretched out his limbs to receive the almost torturing applications, such was his love of life.—Were his last acts those of a suicide, when calling his child and blessing her, he admonished her as a dying Christian man might, giving as his last injunction that she be a good child to her mother. When Deacon Bachelder came there, (who is no more a minister by the way, though he officiated as such, than the other Bachelder is a doctor, though a worthy man) he says, “I am sick of cholera,” not I am dying of arsenic—and the next moment joins in a prayer to the Searcher of hearts, for mercy and eternal happiness, on his entrance in the world of spirits. Do you believe he falsified before God, at such a time, with the poison given by his own hand working death in his system? If you believe it, then acquit the prisoner, for she is to be pitied for having had such a husband, even more than for being arraigned for his death.

Again, he had somewhere to die, if he contemplated self-murder. Their theory is that he had taken the poison Saturday morning, out of the house, and if so, he went home, with the poison in him, to die in her arms! Do you believe that? We have often had suicides to lament, and many have suffered through friends who have been left to self destruction in those mental maladies that crush the love of life; but when did you hear of a man giving himself the fatal blow, and going home to die in the presence of his family!

If then, upon the examination of these two hypotheses for the defense, mal-practice by Bachelder, or suicide by the deceased, you can believe neither, you will proceed to consider the circumstances of the case, bearing upon the prisoner. The government do not make the case, they present it as it is, and

leave it in the hands of the people, which people, for the purpose of this trial, you are. The public officers did not readily move in this prosecution. You have heard that in the first interview with Dr. Hildreth, I told him that unless further evidence appeared, I should not move the matter. Other evidence was obtained and expected to be, and upon this it was thought proper to have the body disinterred and a Coroner's Inquest held upon it; the Grand Jury have found a bill, and the case is before you.

Now upon what amount of testimony will you be willing to find a verdict of guilty? If you say you will not convict of a capital offense, on circumstantial evidence, however strong, then might all the trouble of this trial, and of all like it have been saved, and murder unless proved by confession or an eye witness, go unpunished.

This, gentlemen, is a case of secret poisoning; you have seen in what almost invisible quantity it may be administered and produce death. A few grains dropped into a tumbler, in handing water to one of the jury, might cause death before your eyes, in this crowded Court House, and yet no positive proof be found to charge the perpetrator of the murder. If you require positive proof, in vain will you look for it, in any case of secret poisoning. A single cent, in any country town, would buy arsenic enough to kill every man on your panel. This is our condition, and where is the public to look for protection. Arsenic is used largely in the arts, it is common also for domestic purposes, and can be obtained in almost every shop, as readily as sugar or coffee.

Now let it be understood that the law or the judgment of a jury requires something that can never be done to prove it—(and this has been the result of my experience as a prosecuting officer, in eight or ten trials upon this charge) and secret poisoning will be as common as assault and battery, swindling or theft; and the security of human life, about which we boast so much, and which is so hedged round by the highest sanctions of the law will be as little regarded, and often violated, as the life of a dog in the street. And this exciting trial,

which has occupied the attention of the highest tribunal of the State for a week and is reported by a dozen stenographers to go all over the world, is to be held as the law of the land here, in regard to all who may become the secret victims of indignity, jealousy, ambition or revenge.

Why, as to death by the bullet or the dagger, the murderer has to attack his victim; it requires some physical courage, and there may be defense, the act must be done openly, directly, with some palpable instrument, surrounded by all the dangers of detection—and all these things secure us better than the law or public justice. But if the secret poisoner, who can carry the agent of death on his finger nail, and infuse it into drink or food, may escape unpunished, where is our security? Here, gentlemen, is our only protection—in a jury of twelve honest and intelligent men, who in a case of proper proof will come up boldly to the point, and execute the law of the land, painful, terrible though it be.

I ask you then, is it proved to your satisfaction that the prisoner administered the arsenic? If she did it, she would not do it without covering it up with some artifice.

It is in proof that she knew her husband had consulted Bachelder for a secret disease for which he was taking medicine. At what time she knew it, we cannot tell, but we know that she did know it, and you will judge how far that was a proper opportunity to begin, if she contemplated the deed; at least the opportunity favored the act. In this and in no part of the case do I give an opinion of my own. That I hold in reserve; but it is my duty to offer this as suggesting the *motive*—a secret disease and a woman's jealousy is motive enough for a bad act.

Motive for crime? Why, the burglar risks the State prison, to get the shreds in your parlor which he could earn in a day's honest labor, and the murderer often deliberately destroys his victim, from brooding over a slight offense, an impulse of revenge that a moment's reflection would have calmed down. There is never found a motive in crime which an honest man would think sufficient. You might as well ask a

lunatic as a murderer for his motives. If the maxim is to be established, that a jury will not convict without proof of *motive*, then you give a further latitude to crime, for motive is more subtle and difficult to be detected, even than the chemical agents we have had exhibited here.

I shall suggest no imaginary motive, for it is not for me to draw the curtain of the soul; but, surely, if half is true that the counsel have told you; if, ruined in fortune, broken down in health, a drunkard and a gambler, the victim of a disease that loosened the marriage tie, that had no children to bind it; what is to restrain the jealousy of an infuriated woman, in its revenge, provided she have the heart to entertain it, and wants the moral principle to restrain its exercise?

When was the poison administered? We offer to you the evidence that a quantity of arsenic was administered on Saturday night, in that sage tea, and that she who gave it then gave the earlier poison also. You know he took poison on that morning from his symptoms at noon; and if she administered it at night, the inference is irresistible that she did it in the morning. Was there poison in the tea? It is not the sediment alone, the sweetness, or that it made Goodwin sick, that are to be examined apart from each other to prove it. Each of these *alone* I admit are nothing, like a single pillar that cannot stand of itself; but all together, are like the triangular pillars in mechanics, they will support the heaviest weight. It is their combination on which we rely.

There was a sediment which is sworn to by Mr. Goodwin. He, too, is attracted by the scythe of the counsel that mows down every thing; because he did not mention the sediment to the Coroner's inquest, which was only a mere preliminary inquiry to ascertain whether further proceedings ought to be taken. Mr. Goodwin answered what he was asked, and he was not asked to tell all. The testimony before the Coroner covers but a few pages, while here it is a volume. He now says there was a sediment, and the tea was sweet; was it from arsenic or sugar? She was requested not to sweeten it, and would she, as a kind wife, have done so against the sick man's

wish, and when she knew its sweetness would incite vomiting? —True there is some contradiction as to the taste of arsenic, but who by experiment, can tell how sweet it makes warm water, in solution, for nobody has tasted it in that form unless Goodwin did.

[Mr. Austin here examined the collateral evidence as to the sediment from Boston water or East Boston sugar, which he treated as highly fanciful, and a mere inference from an inference; an improbability founded on an improbability.]

The effect of the tea upon Goodwin was the same as if arsenic had been in it, and its effect upon the dying man was the same as would have followed a repetition of the dose of arsenic. He drank it and threw it up, drank and threw it up again, and these are the operations of arsenic, applied in a second dose. Mr. Goodwin could not have easily been disordered in the stomach from the atmosphere of the chamber, being a painter by profession, and accustomed to deleterious smells, and he was not likely to be broken down in a single night's watching. The slight quantity he took of the solution would excite and irritate the stomach as his was, without producing further effects.

This forms the direct evidence in the case. But it is urged that if the party charged, had caused the death, she would have resisted the *post mortem* examination. Why should she, or what should she know of the perceptible effects of arsenic after death? Until the recent experiment in the case of Mrs. Norton, the popular notion was that arsenic died with the dead, and left no trace that could be found, and why then should she object to an examination, when such objection itself, might invite suspicion? A contrivance was necessary to represent the cause of the death to be cholera, or some other disease, and the examination might confirm the Doctors in that impression.

Another proceeding must strike you as strongly indicative of contrivance. Here was a husband suddenly taken away, and the first mode of exhibiting her grief for the dead was her visits to his grave, twice repeated, in two days. This was

either true love, or the picture of true love strongly painted. If it were true affection, God forbid we should fix it on her as crime; but if it were the affectation of affection, it was only art carried beyond the art it was designed to conceal.

Then comes the extraordinary application to Dr. Storer for the certificate that he died of cholera. Dr. Storer swears that he had this interview with Mrs. Kinney on Tuesday, but neither can he escape the severe remarks of the counsel. They, as do all who know him, admit his correctness, intelligence and high character, but, nevertheless suppose he is mistaken in the day. You have his oath against the argument of the counsel. If it was on the day testified, what but consciousness of guilt could have feared suspicion before suspicion had been hinted to the prisoner? The counsel wish to make you understand that she had been pointed *at* [out] at the funeral, as the murderer of her former husband, and therefore wanted the certificate. The supposition is ingenious, but not correct. No such allusion was made at the funeral, nor is it in evidence that she had heard any thing of the poisoning then.

The Chief Justice. You know Dr. Storer says that he had not spoken to her of it, but Dr. Hildreth had heard of it on Sunday and Monday, and on Sunday it led to the second examination.

Mr. Austin: The application for the certificate implies some cause for apprehension, and how can the transition be made to the death of her former husband, when not a word had been said about him?

Then follows this transaction on the next Sunday when she is first informed that poison was found in the deceased, and her simple answer to this awful disclosure is "INDEED!" It is said much depends on the *tone* in which it was uttered. Try it through the gamut, and see if there is a tone for it that is not at discord with innocence. Why, gentlemen, to have thus received the first intelligence that her husband had died by violence, she must, if innocent, been wound up to a stoicism unsurpassed in ancient schools. Miss Collins passes by and says "you have had an early visit?" "Yes," was the reply, but not a word of the terrible discovery just disclosed to

her, and which she kept locked in her bosom as if she were marble.

And the counsel asks, "who is Miss Collins?" That he can answer as well as I. You, gentlemen, have seen these several young ladies, who with so much modest dignity, propriety and discretion have passed through the extremely trying test of a public examination in a crowded Court; and when the learned gentleman asks, "who is Miss Collins?" I can only answer that she, like the rest, is a splendid example of the results of education in our public schools.

I have suggested to you, that in the whole of this transaction the prisoner if guilty, proceeded step by step by strata-gem and contrivance. If so, the proceedings at the *breakfast of Thursday morning* are a part of it, and as such they are submitted to your consideration.

I approach this topic with reluctance. The closing counsel has seen fit to make it the occasion or the cause of imputations, as gratuitous as they are uncourteous and untrue.

Mr. Dexter. Do you mean to state that the facts are untrue?

Mr. Austin: I mean to say the imputations are totally untrue, and I must beg your attention, gentlemen of the jury, while I explain. In the progress of this trial, each of the witnesses for the government were examined, cross-examined, and their answers taken down. The time of introducing the witnesses was the time for the other side to have objected to any portion of the testimony, and require that the government should state the object and relevancy; and when all was in, and this of Thursday morning with the rest, it was not and is not now believed by me that the gentlemen were or could be ignorant of the legitimate inference to be drawn from it. But if they had asked me privately, as a gentleman at the bar, they should have had my notes as freely as they have had every document and paper in this case. But instead of that, the junior counsel (Mr. Curtis), rises, and with great formality, demands of the court to pass an order upon *me*, to show why I had offered evidence which the court had permitted to

go to the jury! It might be pardonable in a young man, but he should have known better.

The Court replied, as I was well aware they would, that this was not the time or place for such a requisition; and upon this the junior counsel indulged in a strain of remark that might require reply, but that I have no disposition to occupy your time or that of the Court in answering holiday speeches. It is perhaps well enough in a maiden speech, and I ought not to be surprised that the gentleman, feeling somewhat of the importance of a militia officer with a new uniform on for a holiday muster, should attempt to use the sword by his side in an attack upon the Government Officer.

I have never refused it to the senior counsel. He applied to me, not for himself, but with reference to his colleague. What then; was I to have submitted to the rebuke of this young man, by conceding it to him? No: and I told the senior counsel that if he would make the statement to the Court or would say to me that he did not understand the use I intended to make of it, he should have it; and I wrote it out for that purpose in the midst of the trial. He has not said, and never will say, that he did not understand the legitimate inferences from that evidence. He now says he would not ask it for himself because I had denied it to his colleague, and by that he admits that he had all he wanted, and only wanted it to cover his colleague.

And yet he has told you that I have kept back an argument to spring it upon the prisoner! I confess I am restrained by the respect I feel for the Court, and for the solemnity of the occasion, from retaliating upon him, as such discourteous, ungenerous and unjust conduct deserves.

It is Christmas day, and rarely are our Courts open on this day; but I well remember, thirty-four years ago, when they were open on this anniversary for the investigation of a homicide committed at the hour of noon, upon the public exchange. It was a time of high excitement, of emotion, of feeling, of party. I remember the conduct of the defense on that occasion, by one of the most gifted and eloquent counsellors ever

known at this Bar; and I remember the civility, the consideration and kindness with which he treated my predecessor. All the sensibilities I then may have had in relation to that trial, were long since buried in the grave, and I only regret that the learned counsel, who appears in this defense today, while he has somewhat of the ambition and much of the talent, has not inherited the courtesy of his father.

[*Mr. Austin* alluded to the trial of Selfridge for the murder of Charles Austin,¹¹ a cousin of the Attorney General. Selfridge was defended by Samuel Dexter,¹² father of Mr. Franklin Dexter.]

I will now read to you the paper I had prepared to give the Counsel had he desired it for himself. I propose to draw from the facts at the breakfast, as follows:—

“That there was poison—arsenic in the house.

That Mrs. Kinney had possession of it.

That she used it.

That the probable object of using it was to produce the idea that the cholera prevailed in the family, and thus, by a general indisposition of its members, countervail the belief that Mr. Kinney died by poison.

That if the jury believe the prisoner possessed arsenic on Thursday, and does not show whence or when she obtained it, they are warranted in the conclusion that it was in her possession on Saturday previous.”

It is too late for me now to illustrate all the positions on which we rely in this cause, but the first suggestion in the preliminary inquiry was, if the prisoner poisoned the deceased where did she get the poison? Dr. Hildreth is entirely mistaken when he says I told him it was important to find a paper in the house containing, or that had contained poison. It was found before I saw him, though not known to either. The paper is here, and you have the evidence. It is a strange coincidence. The deceased died of poison, and while no traces of it is found in his private drawers, there is found a paper marked poison, dropped down at the spot whence was taken an article of food that poisoned the family.

¹¹ See: 2 Am. St. Tr. 544.

¹² See: 12 Am. St. Tr. 351: 12 Id. 338.

Was it not a most remarkable circumstance that the sickness of all the family, the finding of the paper, and the wish of the prisoner to obtain a certificate of cholera, should all turn up at once in the same house? If, indeed, the prisoner be the victim of circumstance in all this, it would almost seem she was the victim of a higher power, and that the finger of heaven points you to do your duty, be as serious as it may!

These are the circumstances in the case, and whether they are to be like chaff and of no effect, or like the arsenic fatal to human life, you are to judge. If we were permitted to consult only our feelings for the prisoner, I doubt not you would open the bar, relieve her from arrest, and say God speed to her, in her future journey of life. If guilty, she carries a wound within, no sympathy of earth can heal; but if innocent, God forbid that a hair of her head should be touched: all our feeling will be desire to relieve her from the imprisonment, the suffering, the anguish, she has endured, by this accusation and trial.

Justice may authorize you to say so, by your verdict. I trust it may; but however you may feel for her, Justice has not an eye for one being alone. It looks to the whole community, and however painful it may be to apply its sanctions to an individual, and she a helpless woman, the single infliction is more than relieved, whenever it is demanded by the shield it throws over the unprotected citizens of the Commonwealth.

THE CHARGE OF THE CHIEF JUSTICE

CHIEF JUSTICE SHAW: *Gentlemen of the Jury*—It is almost impossible to exaggerate the importance to the defendant, to the community at large of this prosecution, and the weight of responsibility which it casts upon all those who are concerned in the conduct of the trial. On the one hand we are called upon to vindicate the law, for the protection of human life, in the domestic sanctuary, where man has garnered up his dearest hopes, where he has a right to expect the highest security from fidelity and affection, and that too against a secret and

most atrocious crime from which neither manhood nor vigilance can guard him.

On the other hand we see before us a female in the maturity of life, apparently talented, educated, and well connected, a widow and mother, relations commanding the deepest sympathy, charged with the darkest crime perhaps, which a woman and a wife can commit. If guilty, none of these recommendations should shield her from that punishment which a crime so destructive to every community demands.—But should a woman so situated be convicted while under a false accusation, of so deep and atrocious a crime, it would not only be an irreparable and most deplorable act of injustice and wrong to her, but would bring discredit upon the law and upon the administration of criminal justice, which would destroy public confidence, and be productive of disastrous consequences to the community. Whatever tends to weaken the confidence of society in the power of the law to discover the guilty and protect the innocent from false accusations, tends in an equal degree to injure the efficacy of the law as a security for social rights.

Considerations of this kind, arising spontaneously in the minds of every one charged by the law with an active participation in the conduct of such a trial, necessarily lead to that feeling of deep responsibility which is thrown upon every member of the Court and Jury; an earnest wish and sincere desire to discover the truth, and to avoid error, mistake and false judgment, on the one hand or on the other. But from this responsibility there is no escape. When such an accusation is made, it may be true, or it may not, and trial must be had. No other means can be used than are offered to human judgment, imperfect as it is, by the aid of the best wisdom which can be had, and under the guidance of those rules of law and evidence, which long experience has shown to afford the best means of discovering truth in a course of judicial proceeding. The conclusion to be drawn from these considerations is not that the jury are to be deterred from acting, but that they will bring to the inquiry the best powers of their

minds in weighing the evidence, and applying the law with intelligence and impartiality. But gentlemen, we have not only need of all the vigilance, intelligence, and impartiality, which the mind of man can exert, but of that wisdom which cometh from above. Let us then humbly and fervently implore the divine blessing on this day's duties, asking of the Author of all light, wisdom, and good to enlighten our minds, to purify our hearts, and enable us to discover and to follow the path of truth.

The charge against the prisoner is that of murder; the murder of her husband. The general definition of murder is the killing of any person under the protection of the law, with malice aforethought, either express or implied. Formerly, by the common law, the murder of a husband by a wife was considered and called *petit-treason*. It was regarded as something more aggravated than common murder, inasmuch as it was in some measure a violation of that obligation of duty, somewhat in the nature of allegiance from a subject to a sovereign, which the wife owed the husband. It was also subject to what was regarded as a severe punishment, that of execution by burning. But this distinction is now done away, and the murder of a husband is put upon the same footing by the law, as the murder of any other person.

The mode by which death may be caused, may be infinitely various; and in point of law the mode is immaterial, whether by wounds, by suffocation, starvation, exposure to ferocious animals, by poison, or indeed, any possible way in which, by human means, life may be overcome.

In many cases, when it is clear that one person has directly or indirectly caused the death of another, the first great question, perhaps the only question is, whether it was by malice.—But when the accusation is of murder by poison, the question of malice can hardly arise, because the very case supposes design, preparation and purpose which amount to the sure indications of express malice. The deliberation and contrivance necessary to accomplish the purpose, prove the existence of malice propense. It is therefore unnecessary to point out

the distinctions between expressed and implied malice, and homicide without malice, which are often amongst the most difficult inquiries, which can be presented to the minds of a Jury.

In order to establish the charge of murder by poison, it must appear that the accused with an intent to destroy the life of the deceased, or do him great bodily harm, wilfully prepared the poison, with an intent that the deceased or some other person should take it—and that either by her own hand or by some unintelligent, ignorant or unconscious agent, it was delivered to him to such intent; that the deceased took it, and that such poison in fact caused the death.

And these are the facts, which must be proved to the jury, in order to warrant a verdict of guilty in the present indictment against the prisoner. The main point is, that she wilfully prepared the poison, with an intent to destroy the life of her husband, and that through her means pursuant to that intent it was administered to him and did cause his death. It is immaterial by what means it reached the deceased; it is in such case the guilty contriver and not the unconscious agent, who is the sole author of the crime. An interesting case, illustrative of this point, is stated in some of the old books. A man having for some cause malice against his wife, with an intent to destroy her life, charged an apple with poison, and watched a favorable opportunity to present it to his wife in a manner apparently kind and affectionate. She, in the spirit of maternal kindness, gave it to a child to eat, whom the father dearly loved. Although he witnessed the act, he was afraid to interfere lest he should expose himself; the child ate the apple and died. In contemplation of law, the child was maliciously destroyed by poison, and this was murder; but it is manifest that it was the guilty father, and not the unconscious and agonized mother, who was the sole author of the atrocious crime.

If the facts thus stated, as constituting the legal description and definition of the offense, are all clearly and satisfactorily proved, either by positive or circumstantial evidence, it is not

necessary to prove a motive to the crime. It is impossible so foul an act can be lawful, and therefore the inducement, the motive, whatever it may be, must be unlawful; and such unjustifiable act upon an unlawful motive is the essence of the crime.

In another view indeed, and in this very case, as may appear afterwards, the question of motive or no motive, may become very material. When the evidence is wholly or mainly circumstantial, the absence of any motive is a very strong circumstance against the conclusive character of a train of other circumstances, having a general tendency to establish the accusation. This is founded upon the obvious consideration from conviction and experience, that no man will commit a heinous crime, thereby violating his own strong natural sense of justice and the clear dictates of conscience, and expose himself to the severe punishments of the law, without a motive, and even without a strong and urgent motive. Such considerations would be greatly strengthened by proof, if it exist, that so far as the motives, dispositions and feelings of the accused are disclosed, either by conduct or language, they would lead to an entirely opposite course of conduct.

So on the contrary, in a case of circumstantial evidence, where there is evidence tending to establish guilt, the force of such evidence will be much heightened by proof that the accused had, by language or conduct, manifested a hostile disposition toward the deceased. The Jury are, therefore, to consider that if the fact of wilful killing is otherwise proved, it is not necessary to prove any motive to constitute the crime of murder—when the question is upon the fact itself, whether the accused did wilfully cause the death of the deceased, the presence or absence of any motive to the act, is a very important circumstance in estimating the force and weight of the other evidence.

This distinction is more important, and more fully presented to the jury in the present case, because the charge against the defendant rests wholly on circumstantial evidence. The fact which constitutes the crime which is charged in this

indictment against the defendant, and which is denied by her plea of not guilty, and thus put in issue, is that the deceased died by poison, that it was wilfully and purposely prepared by the defendant, with the design of destroying his life,—that it was administered to him by her, with her own hand, or through some other agency, and that he died from that cause.

It is obvious, from a general view of the evidence, that there is no positive evidence of the fact that she wilfully prepared and administered the poison, which is essential to the proof of the crime:—that is, there is no witness who professes to have seen the act done. It is therefore to be proved, if proved at all, by circumstances, which taken altogether, are of so conclusive a character that they conclude to the proof of the fact, and leave no reasonable doubt upon the mind of its actual truth.

These circumstances may be stated, in general terms to be, that the post mortem examination and detection of arsenic in the stomach of the deceased, taken in connection with the symptoms of his sickness, show that he died by arsenic—that she was so situated that she could have prepared and administered it—that such was her language and conduct, preceding, at the time of and subsequent to his death, as to lead to a strong belief that she did wilfully prepare and administer the poisonous drug; and that any and all other supposable modes of accounting for the facts are too remote and improbable to be entertained; and that these circumstances, taken together, are of so conclusive a character, as to leave no reasonable doubt of the truth of the fact charged. If it fails of satisfying these conditions, and if it does leave a reasonable doubt, then the defendant will be entitled to an acquittal.

In considering the distinctions between positive and circumstantial evidence, each has its advantages and disadvantages. In case of positive evidence, where credit can be placed upon the witnesses, if they are persons of good character, free from all suspicion or participation in the alleged crime, and without interest or apparent prejudice, their testimony to the fact on their own knowledge, is more satisfactory than circum-

stantial evidence, because it points directly to the facts to be proved, and avoids the danger arising from any error or infirmity of judgment in drawing inferences from other facts. —But the witness, or even two or more witnesses, may be entitled to very little credit: they may have a deep interest in screening themselves, and may do it by concealment and perjury. They may be of infamous character for truth, or otherwise shown to be unworthy of credit. It is quite obvious therefore, that positive evidence may or may not be satisfactory.

Circumstantial evidence depends, in the first instance, like positive, upon the credit due to the witnesses who testify to the facts, and then upon the pertinency and correctness of the inferences the jury may draw from the facts proved; and thus circumstantial evidence is exposed to one additional source of error, that does not affect positive testimony. But it is considered as a set-off to this, that as the different circumstances to be proved often come from different witnesses, there is much less room for combination and contrivance, and that a well connected train of circumstances can hardly be invented by art and contrivance which can lead to a false conclusion, and which must be detected by some of the various tests which experience has suggested the modes of applying.

In weighing circumstantial evidence, several considerations are to be kept steadily in view.

1st. The facts from which an inference is to be drawn, that is the circumstances must all be proved by competent and satisfactory evidence, and each by the separate and independent proof offered to sustain it.

2d. That they must be exclusive of any other reasonable or probable hypothesis, which does not include the fact sought to be proved. If all the facts and circumstances proved may be true and do not conclude to the guilt of the accused; or in other words if all the facts proved may be true and yet the defendant be innocent, they do not constitute that body of proof beyond reasonable doubt, which is necessary to establish the charge.

In considering various hypotheses suggested for the purpose of accounting for the facts, consistent with the innocence of the party, it is not enough, however, to suggest a remote, bare possibility that the death might have occurred, or the poisonous drug been received in some other way than that charged in the indictment, especially if a probable ground has been shown by the evidence offered to support the allegation; but if the facts, or all the proof taken together, can be accounted for, by any reasonable and natural supposition of facts which may be consistent alike with the innocence or the guilt of the accused, they are not sufficiently conclusive to amount to legal proof of the fact. Nor would a mere probability, where the evidence of guilt barely preponderates, be sufficient. It must be that which so far excludes all other suppositions as to place the guilt of the accused beyond reasonable doubt.

One other remark of a general character is to be submitted to the jury, in connection with a statement of the legal principle respecting the burden of proof. The burden of proof is upon the conductors of the prosecution to establish the fact charged, to-wit, that the defendant wilfully prepared, and purposely administered the poison, by herself or by some other means. Supposing it proved that the deceased died by arsenic, and supposing the government offered some evidence tending to prove it; then if the defendant offer proof in support of the probability that the finding of the poison in the stomach of the deceased, may have been caused by some other means, it is not necessary for her to prove the truth of such supposition;—that is, that it did happen in such other way.—It is sufficient if the proof leaves the jury in doubt whether it happened in one or the other of the two modes. By way of illustration; if all the evidence left it in doubt whether, if the poison was wilfully administered by anybody, it was by the will and design of the accused, or by the deceased himself, and the evidence left it in doubt by which, it would not be conclusive of the guilt of the defendant.

The presumption of law is, in the outset, that the party accused is innocent, and unless the proof rebuts that presump-

tion, and conclusively proves the guilt of the defendant, she will be entitled to a verdict. That proof is to be considered according to the rules which have been already suggested in regard to circumstantial evidence. These are all the principles of the law which I apprehend are applicable to this case; and it is for you, gentlemen, to consider and apply them.

I do not think it necessary to go over the evidence minutely, it having been thoroughly argued, and I shall allude to it as facts understood by you. You have the testimony of Mr. Goodwin as to the sediment in the tea which the deceased drank on Saturday night. He says that he saw a sediment in the tea. If there was, was it arsenic? Was it put there by the defendant, and if so was it wilfully done with the design to destroy the life of the deceased? All this must be proved or it does not touch the defendant. One of the facts relied on is the sickness of the witness, Mr. Goodwin. Could the tea have been the only cause of that sickness? If the watching, the fetid odor and other causes might reasonably have produced it, it would lead to no conclusion against the defendant. If another had drank of the tea and been injured by it, and it was shown to have been the effect of arsenic, that would have been a strong circumstance; but before you can come to that conclusion, it must be proved that the sickness was caused by arsenic in the tea. The white sediment is too slight a circumstance of itself, because any other white substance might have been there, without the presence of arsenic; and it is here necessary for me to caution you against heaping suspicion on suspicion, to arrive at a conclusion. It does not follow that because arsenic was found in the body of the deceased, it was conveyed there by the tea, because it might readily happen from other causes.

But, gentlemen, I must hasten over these circumstances. If the facts in the case can be reasonably accounted for, consistent with the innocence of the defendant, she is entitled to an acquittal. The Government must not only prove that the death was by poison, but must also prove that the defendant wilfully administered it, before she can be placed on her defense; for

the proof of poison as the cause of the death, would not alone, require any defense on her part.

The learned Attorney General, in his able argument, stated that in charges of poisoning, in order to convict, you must have proof that the drug was found in the body of the deceased, and that he died of it. But you must go one step further, and prove that it was wilfully given, as it might have been done by accident or mistake. This is the *corpus delicti*, the body of the crime, which must be the foundation of the charge.

As to possibility, that the death may have been produced by another cause, it must not be bare possibility, but a reasonable possibility founded on rational causes, and not a remote contingent possibility. If the proof is that the deceased party has been exposed to two causes of death, and a doubt is left between the two, there can be no certain conclusion drawn as to either and the crime is not established.

It seems that the deceased went to Dr. Bachelder some days previous to his death, for medical advice, though, probably from shame of his disease, he did not give his name. One of the suppositions for the defense is, that the death may have been caused from that source. Now as it regards that practice, Dr. Bachelder says he did not administer the bowel pill till Saturday evening. Gentlemen, it is for you to consider testimony, and when one witness is contradicted by another, you must weigh it. Dr. Harrington says that Dr. Bachelder told him he did before that administer that pill to the deceased.

It is stated to you by the physicians, that arsenic is administered in the particular disease for which the deceased was under treatment, yet if you are satisfied that in this case it was skillfully used by Dr. Bachelder, if at all, it cannot account for the quantity of arsenic alleged to have been found in the deceased. But the bowel pill is not shown in its component parts, and Dr. Bachelder is contradicted in his statement that he never used arsenic as a remedy. You will consider the grounds upon which this suggestion is made, that the poison

was administered in these forms, by want of skill, mistake or accident.

But the more important suggestion is that the deceased came to his death by *suicide*. It is not, however, as if he were on trial, or his memory on trial, if such a thing could be, that you are to apply the evidence to this inquiry, because if the fact of suicide were then left in doubt, upon the evidence, he could not be convicted. The dead man is not on trial, and your verdict should not and cannot affect him. The question to be considered here is, that if the rational ground for believing that the death was by suicide, lead to doubt whether the defendant did it, you must acquit.

On this point the evidence is that the deceased had given indications of being tired of life; that he had been to a physician to prescribe for an odious disease; and that the burden of life being heavy, and this disease breaking out, led to the commission of suicide; and if so, it would put an end to the case, without further inquiry. It appears that he was insolvent at his death, and owed about \$2000; and that after the settlement of the estate, including his wife's property, which by law was his, although she kept a milliner's shop, the expenses and charges left but eighty-nine dollars, which was allowed to the widow by the Judge of Probate. Well, that is not a very strong circumstance, for it is by no means uncommon for men who are in debt or insolvent, to get along without committing suicide. So of intemperance and gaming; but you are to take it all together, and judge of it, in connection with his temperament, threats or other indications of such a tendency. In this relation it is your duty to consider the testimony of Mr. Edward L. Tucker, to whom, if he is to be believed, the deceased had said that he had once attempted his life, and that, at times, he did not know whether to go home to his wife, or make way with himself. His testimony is called in question, and this is for your determination.—He appears here with some zeal, but I see nothing in his testimony that does not entitle him to a reasonable belief. As to his volunteering, and writing a letter, offering to be a witness, it is to

supposed that when a matter like this goes abroad in the newspapers, it is likely to lead to suggestions of evidence, and produce calls for witnesses.

If then, upon the evidence, the suppositions of murder or suicide as the cause of the death, are equally probable, you can infer neither, and suicide would be as rational as murder. Both these conclusions are unreasonable *a priori*.—He dies of poison, and in the absence of evidence, as to who administered it, it might as well have been the husband as the wife. It is not a mere preponderance of probabilities between the two, but to arrive at the conclusion of guilt, the evidence must exclude all other reasonable conclusions.

It has been said, in the argument for the prosecution, that a man will not avow a purpose of suicide, if he intends to commit it. But it may be intimated before the purpose is fully formed and this would have a tendency to show that his mind was brooding over it, as one of the modes of escaping the ills of life. In this connection you will consider the bearing of the several intimations of such a purpose, as testified by the witnesses.

The supposed contradictory statements of the defendant as to the cause of her husband's death, are relied on as proof of guilt. Of the bearing of these you will judge. One mode of accounting for her different statements at different times may be this. There is no evidence of her knowing that he was affected with a disgraceful disease, until Saturday evening preceding his death. He had, as was then supposed, been laboring under cholera, and he had concealed from his wife that he had been taking medicine for another disease. At that time he was in extremis, and he found it necessary to disclose to her, or was prevailed on to do so, that he had been to Dr. Bachelder. This led to sending for him, and when she showed him into her husband's room, she says, "There is the man you have given medicine to, and you know for what." When, after the death, Dr. Storer suggested to her that the deceased might have died by poison administered by himself, she said, "No, I do not think George could have done it," as if at-

tributing his death then, in her own mind, to cholera or to what had occurred between him and Dr. Bachelder. Subsequently, when Miss Collins had been to Dr. Storer, and learned that poison had been found in the deceased, and returned and told it to the defendant, she then said, "Would to God that he would show the mystery why Geoge had done it." The suggestion of the Counsel for the defense, in explanation of this apparent contradiction is, that when the reply to Dr. Storer was made, she did not know that poison had been found and was in doubt as to the cause of the death, but on learning that fact, the suspicion of suicide was entertained.

It is also suggested, that to the world generally, she did not wish to admit the idea of death by his own hand, and therefore, she would not disclose it or repel it. At another time she said to Miss Hosford, the niece, in alluding to the condition she had seen him in, on a particular occasion, when excited by liquor, that perhaps he was taken away in mercy. Now, gentlemen, when placed in the situation the prisoner was, it is difficult to say how a person would act, especially when there were intimations that the party herself might be called upon to answer for the death. The very apprehension of being brought to a public trial is what a woman, though innocent, would greatly dread, and the different remarks and views, and apparent contradictions in the defendant, may thus be accounted for.

You will recollect another conversation at Thetford. She then intimated that her husband had died by his own hand, and that he exclaimed, "Oh God, have I killed myself!" Now this may be taken, either as an intimation of direct agency, by suicide, or that he had brought upon himself a series of evils that had resulted in death. This is in evidence. It comes from her, and in fact what she and the deceased have said, constitutes a large part of the testimony. We have at times apprehended that it was taking too wide a range, but it has been difficult to limit it, because open to the question whether he may have accelerated his death.

You have been asked what amount of circumstantial evi-

dence you will require, in order to convict. The amount necessary, is first that the facts are all proved beyond reasonable doubt, and second, that the conclusions are correctly drawn, and exclude all other fair conclusions. That is the amount of evidence required, and if the facts cannot be proved, the prisoner must be acquitted; and although the party might be discharged from this bar, and universal suspicion still rest upon the public mind, the verdict is right, because the evidence is in doubt.

So far as there is proof of any attempt to conceal and pervert the truth, it is evidence tending to show guilt; and on the other hand, if the defendant has facilitated inquiry, and not objected to investigations that might expose guilt, if it existed, it is to be taken as proof of innocence; and in this light you will consider the readiness with which the defendant assented to the post mortem examination. It could not have been held if she had objected to it, and indeed they had no right to do it, but by her consent, although it was an interesting case, in which, as a matter of science, such a course was desirable and proper. The attempt to obtain a certificate of death by cholera, is strongly urged against the accused. Now, if believing that her husband died of poison, she asked for a certificate of cholera, that would be a strong circumstance, and here the precise time of the request, is very material. If it were on Tuesday or after she had heard of suspicions against herself, and before she knew the doctors had changed their first impressions as to cholera, and detected poison, it would be natural, but if after she knew the death was by poison, she applied for a certificate, it would lead to an opposite conclusion.

The fact of finding the poison, was not made known to her, by Dr. Storer, until the Sunday after his death, and she applied for the certificate on Tuesday or Wednesday. Another fact is in evidence that she told Dr. Storer she had been pointed out as the poisoner, before she knew the poison was found, and this is supposed to have been an outbreak of conscious guilt before accusation. On the other hand, it is said that rumors and reports were then in circulation. Were there

such surmises at that time? It appears that Dr. Storer did not pronounce an opinion that the death was from poison until the chemical analysis was made, and yet on Sunday, the day of the death, he had said to Dr. Hildreth, "if you will keep our secret we will tell you there were indications of poison." There were surmises then of poison, and when were the rumors afloat? Cheatham and Ridley say that they did hear such remarks, in connection with the defendant, in the crowd at the funeral. It may be true that she did not hear what they did, but if they heard it spoken of, probably it was spoken of by others, and if by others, she may have heard it, and if she did, it repels the inference of preconceived apprehension before suspicion.

It becomes necessary here to allude to another circumstance, the alleged design to cover up the real cause of the death, and convey the impression that cholera was in the family, by the occurrences of Thursday morning; but the first, and most material point, is to show that the defendant must have put arsenic into some of the articles used at the breakfast. Now the fact is that she was sick herself, after the breakfast, and to repel this, it is suggested that she did not intend to take life, and only to produce sickness and not to kill; but before you reach this, you must be satisfied that she put arsenic into the food. The fact on which this theory is built is, that blue paper was found, marked "poison." Did it contain arsenic, and did she put it in the food? If so, the inference is established; but if these facts are in doubt, it fails.

There are a great many other circumstances in the case, but it is not necessary to go over them. With respect to the purchasing of arsenic at Dr. Mead's shop, it is entirely out of the question; it is not proved that she was the woman who bought it, nor is the transaction in any way traced to her. Then, gentlemen, consider the conduct of the prisoner before and while her husband was sick. It appears that they had lived happily together, that no known differences or dissensions existed, and on the whole her conduct in this respect appears to be free from blame. Now, conduct of this sort, in the relations

between the parties, or in the last sickness, is not material of itself, but in a charge of administering poison, where one of the two may have done it, the husband or the wife, that conduct favors the supposition that *she* did not do it.

One of the suggestions on the part of the prosecution is contrivance and preparation with reference to the act, and if there had been any such, it would be a strong circumstance. It is urged, in this connection, that with reference to the events of the Thursday breakfast, she sent her little daughter out of the way to Vermont; but if there are other natural causes for the child's going, such as that she was rendered nervous by discovering the blood on the dead body, or that she was attached to Harriet Hosford, who was going to Thetford, and her mother intending to follow; that circumstance can have no bearing in the case. So in all other supposed indications of contrivance, the question is whether there is any thing in the proceedings and conduct of the defendant that shows there was preparation and design, which cannot be reasonably attributed to some other cause consistent with her innocence. The learned counsel for the defense alluded to several circumstances that are entitled to weight. She sent for Mrs. Varney, and desired her to come as soon possible, and when Miss Collins, who was residing in the house, was going away to pass Saturday at Charlestown, Mrs. Kinney urged her to come back, and she did. Was this consistent with the fact that she was meditating this crime? If so, would she send for persons to be present, who might be witnesses against her, or would she get all she could out of the way?

Another circumstance relied on, is her telling Dr. Bachelder that she feared her husband would not get well, and giving as a reason, that a former husband had died much in the same way. Now if it were proved, or were capable of proof in this trial, that a former husband died of poison, it would have weight; but if she then supposed the sickness to be cholera and her former husband had died of it, or a similar disease, it was natural she should express fears.—In all matters of conduct and expressions under circumstances like these, it is

difficult to tell what a person may do: the facts are before you, judge you. If she were desirous of preserving her husband's memory from blame, and at the same time knew his failings and habits, she might express herself stronger or differently, to some than to others. Thus she told his niece, Harriet Hosford, of his dissipation, but desired she would not mention it to others, while to others she might decline speaking of it, or give a different impression.

With regard to *MOTIVE* you will judge of its weight in the case. The suggestion by the Government is, that incited by jealousy at the discovery of the secret condition of the husband, she was impelled to take his life. On the other hand it is urged that the harmony between them and the kindness of the wife, to the last, repel the suggestion of any such motive; and it is in evidence that the husband used the certainly strong expression in regard to the conduct of the wife, that he never saw a scowl on her face. It is also contended that the question of motive goes stronger to prove suicide by him than murder by her; and in this view it is therefore a comparison of motive.

I will not detain you longer upon a review of the evidence, as I should have done had I time to go over it, and you were not fatigued tonight by the great length of the trial. But gentlemen, the case is one of circumstantial evidence, and it is necessary for the Government to make out to your satisfaction, that the crime was committed, that the defendant knowingly and wilfully administered the poison, by herself or another, and that death ensued. If on a full consideration of the evidence all of these facts are not made out, then there is no sufficient ground for a conviction; or if a reasonable doubt rests upon the facts, then she is entitled to an acquittal. I have no doubt you will give to the case all the consideration it deserves and render such a verdict as your duty to the community requires, and that will be satisfactory to yourselves and to the country.

THE VERDICT

The Jury were absent from their seats THREE minutes, and returned with a verdict of NOT GUILTY. The announcement was received with an applause that could not be repressed, and after Mrs. Kinney was discharged, the crowd went into the street and gave expression to their feelings in cheers.

The Boston lawyer who made a full report of the trial says at the end of his pamphlet:

“Having minutely taken all the testimony and arguments in this case, which the reporter began with a strong prepossession from public rumor, he feels bound in justice to say that in his opinion, and as far as he knows, that of the entire Bar, the Government not only failed to show the guilt of Mrs. Kinney, but the evidence proved her innocence and ought to relieve her from all unjust suspicion.”

THE TRIAL OF LIEUTENANT JAMES RENS- SHAW FOR OPPRESSIVE AND UNBECOMING CONDUCT, NEW YORK, 1808.

THE NARRATIVE.

Captain Petty of the Schooner *Speedy* employed a New York lawyer named Strong to bring an action for damages and related to him the following story: That he was on board his ship one day when he was hailed by a United States gunboat, and told by its commander, Lieutenant Renshaw, that he was to come on board at once and pilot the boat to a harbor. He said he would do it for ten dollars, to which the commander replied that he would be d——d if he would give him ten cents. The captain refused to do anything, whereupon the commander took him by force from his schooner and compelled him to take the boat, telling him that if he ran it aground he would be shot. Then in order that he should have his services again when he put to sea, he put him in irons. Petty in a few days made his escape to another schooner, but was followed by Lieutenant Renshaw, who told him that if he did not come back he would send a force to bring him and would cut him in mincemeat and destroy his schooner. When the commander went to get the men, the captain was able to reach his own ship and sail away, and escape the threatened punishment.

This being published in a city newspaper, the Secretary of the Navy ordered an investigation; a Naval Court of Inquiry duly assembled and after hearing all the evidence presented, unanimously reported that the charge was false, which finding was approved by the Secretary of the Navy.

But there was more to follow. See post p. 659.

THE TRIAL.¹

In a Naval Court of Inquiry, New York, September, 1808.

LIEUTENANT JACOB JONES,² *President.*

LIEUTENANT SAMUEL ANGUS,³

LIEUTENANT CHARLES LUDLOW.⁴

September 25.

On September 2, 1808, David Petty made affidavit as follows, which was printed in a New York newspaper, the Commercial Advertiser, the following charges, viz.:

That he was the master and commander of the Schooner *Speedy* of Brookhaven. That on the 19th day of August last past, he was sailing in the said schooner on the south side of Long Island, bound from New York to Coriches in Brookhaven, and when opposite Gilgo Gut he was fired at and brought to by gun-boat No. 40, commanded by James Renshaw, who sent a barge on board the deponent's schooner, and after examining her permitted her to proceed on her voyage. That after she had proceeded about one mile to the windward, he was again fired at and compelled to bear away and come under the lee of the gun-boat, when the commander demanded the

¹ *Bibliography.* Proceedings of the Naval Court of Inquiry, held by Order of the Secretary of the Navy. Appendix to Trial of Renshaw. See post p. 660.

² See: 1 Am. St. Tr. 540.

³ ANGUS, SAMUEL (1784-1840). Born Philadelphia; entered the U. S. Navy, 1799; on board the *Constellation*, 1800; Lieutenant, 1807; wounded severely on board the *John Adams*, 1812; Master Commandant, 1813; Captain, 1816. Died Geneva, N. Y.

See Callahan (E. W.) list of officers of the Navy of the U. S. and of the Marine Corps, 1775-1900. . . . 1901. Hammersley (Th. H. C.) Gen. Reg. U. S. Navy and Marine Corps . . . 1882. Maclay (E. S.) Hist. U. S. Navy, 1775-1898.

⁴ LUDLOW, CHARLES. Midshipman, Nov., 1798; Lieutenant, 1802; resigned, Aug., 1811; reappointed Lieutenant, Sept., 1811; Commander, Dec., 1811; resigned, May, 1813.

See Callahan (E. W.) ante; Hammersley (Th. H. C.) ante; Maclay (E. S.) see ante, mentions Charles Ludlow as senior lieutenant of the *President* in 1811.

Paullin (C. O.) Commodore John Rodgers . . . 1910: "There were in New York under his (Rodger's) command 'Vixen,' Lt. Charles Ludlow, in 1809."

deponent to come on board and pilot him into Fire Island inlet, which the deponent consented to do for ten dollars; to which the commander replied that "he would be damned if he would give him ten cents," and added that if the deponent did not obey, his schooner should not be permitted to leave the gun-boat; whereupon the deponent persisted in his refusal; the said commander sent his barge on board the schooner, with orders to take by force the deponent or one of his men out of the schooner and bring him on board the gun-boat. That the deponent was thereby compelled, without his consent, to leave his own vessel and go on board the gun-boat, where he was kept and detained three days. That not being able to beat up to Fire Inlet, they were obliged to go into Gilgo Gut, with the navigation of which the deponent was totally unacquainted, and on his mentioning that circumstance to the commander, was told by him, "that if he, the deponent, run the gun-boat aground he should be shot." That having passed the Gut in safety, and the gun-boat anchored in the bay, the deponent was on the following day, by order of the said commander, *put in irons, with handcuffs on his wrists and shackles on his legs*, and kept so in irons for *one whole day and night*, during which time he had very little refreshment and was treated with much abuse by the said commander. And the deponent did further protest and swear that he knows of no reason for such treatment from the said commander, except his wishes to detain the deponent on board until such time as he should see fit to go to sea, and require the deponent's aid in navigating the gun-boat out of the Gut. That on Sunday the 21st day of the aforesaid month of August, about noon, some persons were coming on board the said gun-boat while lying at anchor in the bay, and before they reached her, the said commander ordered the irons to be taken off the deponent. That in the afternoon of the same day the said commander wishing to go on board of a brig that lay at no great distance on the beach, the deponent requested and obtained leave to go with him. That after visiting her, he was ordered by the commander to return on board the gun-boat which the deponent refused to do—whereupon the commander presented a sharp pointed cane at the deponent's breast, and thrust the same at him several times, in order to compel him to go. He then ordered two of his men to seize the deponent, and to tie him and take him on board the gun-boat. That they did seize and throw him down—whereupon a person belonging to the said brig interfered, and took up a large maul with which he threatened to strike them unless they would release the deponent; that they then let up the deponent, after which the commander abused him with very insolent and profane language, threatening that he would *cut him in mince-meat, and destroy his schooner*. He then ordered one of his men to stand by the deponent with a loaded musket and to shoot him through in case he offered to stir, while he, the commander, could go on board the gun-boat and get a reinforcement of men, in order to compel the deponent to go on board the gun-boat, taking the said sentinel with him, and while he was gone the deponent procured two men of his acquaintance from the said brig to carry him in a boat on board his own

vessel, then lying at Fire Island, about 12 miles to the eastward and so elude the said commander.

The Secretary of the Navy, Robert Smith,⁵ deeming the charge to so seriously implicate Lieutenant Renshaw of the U. S. Navy that an investigation of the circumstances was indispensable, ordered Commander John Rodgers⁶ to institute

⁵ SMITH, ROBERT (1757-1842). Born Lancaster, Pa. Volunteer in Revolutionary war and served at Brandywine; member Maryland Legislature; was successively Attorney General, Secretary of the Navy and Secretary of State. Died in Baltimore.

⁶ RODGERS, JOHN (1773-1838). Born in Hartford Co., Md.; his father moved to Havre de Grace 1780, where he kept a well-known tavern; apprenticed to Captain Benjamin Folger in Merchant Marine service, 1784. When not yet 18 was made first mate of the *Harmony*; given command the *Jane*, 1793; left merchant marine service to become Lieutenant in U. S. Navy, 1798, being appointed by President Adams; assigned to the *Constellation* and was soon made executive officer. His first sea fight was between the *Constellation* and the *Insurgente* (a French ship of war), Feb. 9, 1799. For his part in the capture of the *Insurgente* he received a vote of thanks from Congress and a silver medal. Promoted to Captain, 1799, and given command of the *Maryland*. In 1801 he was bearer of dispatches to France. In 1802 was assigned to the *John Adams* with Mediterranean squadron operating against the Barbary States; in May, 1803, he captured the Moorish ship *Meshouda*; July 21, 1803, in co-operation with the *Enterprise* he engaged nine gun-boats and destroyed a Tripolitan corsair. In Dec., 1803, was given the *Congress* and joined Commodore Barron's Squadron in the Mediterranean. In 1805 he succeeded to the command of the station. In June, 1805, he procured from the Bashaw of Tripoli a treaty abolishing the tribute heretofore exacted not only from the United States, but from all the European powers and also immunity for Chinese captives from bondage to their captives. The same year he compelled the Bey of Tunis to sign a similar treaty. Returned home and from 1809 until 1812 commanded the Atlantic home squadron with the *President* as flag-ship (affording protection to American seamen against impression in the British navy). In 1809 was President of the Court in court-martial of Barron. On May 16, 1811, while off of Cape Henry the *President* (Rodgers commanding) hailed an unknown ship which failed to respond but fired on the *President*. The latter then opened fire with the result that the *Little Belt* (as it proved later to be) was crippled. As the *Little Belt* was an English ship, the affair helped to hasten the War of 1812. A court of inquiry exonerated Rodgers (Aug. 30, 1811). When war was declared, Rodgers sailed from New York with his squadron. By end of war he had captured 23 prizes and was wounded in one encounter. Appointed June, 1814, to command *Guerriere* (a new frigate). During part of

an inquiry into the circumstances of the case and to make a report to him, the Secretary.

Thereupon the said Commander John Rodgers ordered the above Court of Inquiry to assemble on board the United States Bomb Ketch Etna on Monday, September 26, at 9 o'clock a. m., to inquire minutely and particularly into the conduct of Lieutenant James Renshaw, commanding the United States Gunboat No. 40, on the said charges of the said David Petty. They were directed to appoint Fleet Surgeon as Judge Advocate and to transmit the proceedings to him, the said John Rodgers, that he may forward the same to the Secretary of the Navy, to receive his further orders.

The trial began today.

SAMUEL R. MARSHALL, *Judge Advocate.*

THE EVIDENCE.

Richard Millikin: Am master's mate. On 19th August, 7 a. m., Lieutenant Renshaw in the gun-boat No. 40, brought to a schooner commanded by Petty, and asked him to take the gun-boat in. Petty asked what he would give. Lieutenant Renshaw demanded what he would ask. Petty answered, ten dollars. Lieutenant Renshaw replied he would not

give him ten cents, but told him he would send a man on board to assist in working her if he would come on board, and if he would not come or send a man, he would detain the boat and follow her in. Petty then came on board and ordered sail for the inlet, but as the wind hauled to the east and the boat made no way, he advised Renshaw to go

1814 he was in Baltimore commanding the sailors and marines in co-operation with the militia in the battles of North Point and the attack on Ft. Henry; 1815, president Board of Navy Commissioners; 1822, resigned to take command of a squadron to suppress piracy in the West Indies. In 1818 was offered by President Monroe the Secretaryship of the Navy, but declined. Oct. 6, 1821, became the senior officer of the navy. In 1823 he served for a short time as Secretary of the Navy *ad interim*. From 1824 to 1827 he commanded the Mediterranean squadron; 1827, again president of the navy board until 1837. Died in Philadelphia. See Bailey (I. H.) *Am. Naval Biog.* 1815; Brown (J. H.) *Am. Naval Heroes*, 1775-1898; *Naval Encyc.* 1881 (Hammersley & Co.); Paullin (C. O.) *Commodore John Rodgers*, 1773-1838, 1910. The *Naval Encyclopedia* says Rodgers was born 1771. Paullin (C. O.) quoting from Rodger's autobiography says, 1773; Paullin quoting from tombstone (Congressional cemetery, Wash., D. C.), says 1772.

into Gilo Gut as it was a good harbor. He took the boat in and he went on shore to gun. He remained on board three days, going on shore frequently and appeared satisfied and expressed himself he was well used, even better than he would have been on board his own vessel, as he messed with Lieutenant Renshaw.

THE COURT: Did you see any violence used to the person of Petty, such as putting him in irons or attempting to confine or threaten him? I never did. Believe that he came on board of his free will. Did you hear Petty express any dissatisfaction at being on board the gun-boat or ask permission to leave her? I heard him say he wished to be on board his own vessel if the wind would allow him to proceed, but never heard him ask Lieutenant Renshaw for permission to go. Never left the vessel. Were you so situated that if Petty had been put in irons you must have known it? Never saw or heard him ordered in irons, and if he had been in irons I must have seen him. Did not hear Lieutenant Renshaw tell Petty that if he run the boat on shore he should be shot.

Joseph Richardson: Am gunner. Lieutenant Renshaw ordered me to go on board the *Speedy* for Petty. He came with me willingly. Lieutenant Renshaw asked Petty if he had taken breakfast and Petty went into the cabin with him. Petty advised Lieutenant Renshaw to go into Gilo Gut; Lieutenant Renshaw asked him if he was acquainted with the passage; he answered, yes, and told us to take notice of the passage in case we should wish to go in there again. In about

two days Petty was drinking tea with the corporal and myself. He saw a pair of irons for the feet, and either put them on himself or they were put on by Thompson, a marine. He went on deck with his pipe in his mouth hoping about to try how he could jump in the irons. The irons were not on him more than fifteen minutes and were not confined. The Sunday after, Lieutenant Renshaw and Petty went on shore shooting — they landed close by a brig on the beach — when Petty gave his musket up, not having used it, and went on board the brig with a carpenter who was working on board. In a short time Lieutenant Renshaw came and asked where Petty was and ordered me to go and call him. I went alongside and told him that Lt. Renshaw wanted him to go on board. He answered that he did not intend to go on board again. Lt. Renshaw then went, attended by myself, on board the brig and asked Petty what was the reason he would not pilot the gun-boat out. Petty answered that he was on shore and that he would not go on board again. Lt. Renshaw told him that as he had piloted a vessel of the United States in he ought to take her out again. Petty replied that he did not know the passage out. Lt. Renshaw then swore by G — that as he had piloted the vessel in he should take her out again and demanded of the people on board the brig whether they protected the pilot. He then ordered me to take hold of Petty to take him to the boat. I endeavored to persuade him to go. He said there was no use of his going on board when he would not be paid. Lt. Renshaw then gave him his

honor that he would pay him as soon as he piloted the vessel out. He replied that he would not go as he did not know the passage out. Lt. Renshaw had a small bamboo cane which he pointed to Petty, on which Petty seized Lt. Renshaw, and the people on board the brig ordered me to keep off from separating Petty from Lt. Renshaw. One of the carpenters belonging to the brig had taken up a large maul and was in the act of striking Petty. Petty then let go of Lt. Renshaw after which Lt. Renshaw observed that he would take him if he went on board and brought all his men for that purpose. We then left the brig and as we were going down Petty damned Lt. Renshaw, telling him he may find the way out as he found it in. Lt. Renshaw and myself then went on board the gun-boat and taking two more men, went on board the *Speedy*, lying at Fire inlet for the man who had been put on board of her, and we there saw Petty. Lt. Renshaw was invited into the cabin by Petty. Lt. Renshaw went down and stayed near half an hour. Petty gave the boat's crew a drink of grog and some Indian corn. The boat then put off from the *Speedy* and went to the gunning house on shore. After this I saw nothing more of Petty.

THE COURT: Did you or any one who went in the boat on board the *Speedy*, receive orders from Lt. Renshaw to bring Petty or any of his crew by force, in case they would not come willingly? No. Did you hear any threats or abusive language used at any time to Petty whilst on board the gun-boat, by putting him in irons, or attempting to confine him? No. Did you hear

Petty at any time express dissatisfaction at being on board the gun-boat, or ask permission to leave her? No; he went on shore frequently, shooting.

I believe he came voluntarily, for another man offered to come if he did not. Had Petty at any time have irons put on his hands? Yes, they were put on by myself for about five minutes, but not confined, to gratify his own curiosity. Did you hear Lt. Renshaw threaten to shoot Petty if he run the boat on shore in going in? No, I was at the helm from the time we bore up to the time we anchored and heard no threats of the kind used. Did Lt. Renshaw threaten at this time or any other, to destroy Petty's schooner? No.

Lieutenant Renshaw: Did you hear me threaten to detain his vessel in case he did not come on board to pilot the boat in? No.

George Shields: Am steward. Were you on board gun-boat No. 40 all the time Petty was on board? Yes. I believe he came voluntarily. I heard no threats used, such as putting him in irons or attempting to confine him? No. To gratify his own curiosity irons were put on him by John Thompson and were taken off again in about three minutes.

Lieutenant Renshaw: Did not at any time order Petty to be put in irons or to be confined. Did not hear Petty express dissatisfaction at being on board the gun-boat or the treatment he received.

Abijah Shepard: Am corporal of marines. Was on board the gun-boat. Petty came down forward once where he saw the

irons and put them on his feet. Never saw him have them on at any other time. He put them on and took them off himself. He had not them on but a few minutes. Lt. Renshaw did not have Petty put in irons at any time. Did not hear any threats used at any time by Lt. Renshaw to Petty. He did not appear to be dissatisfied with the treatment, but towards the last expressed a desire to be on board of his own vessel. The officer that executes the duty of master at arms and takes care of prisoners when they are confined is the corporal of marines.

Edward Rice: Am private. Petty, seeing a pair of irons, asked Thompson, laughingly, to put them on him, which Thompson did and Petty then endeavored to walk in them, but finding he could make no hand of it took them off again. He appeared very well satisfied and was very free with the men whilst on board.

Nov. 27.

Dennis O'Neil, a private: Lt. Renshaw, Petty, the gunner and myself went on shore with two muskets for the purpose of shooting. Petty and Lt. Renshaw entered into conversation with some gentlemen. I went to the beach to shoot, and in about half an hour returned, and saw Lt. Renshaw with the musket which had been before in Petty's hand. Petty was not then present. Shortly after Lt. Renshaw told us to get in the boat, and asked for Petty. The gunner told him he was then on board the brig lying on the beach. Lt. Renshaw ordered him to go and tell him to come, he was going on board. The gunner returned and informed Lt. Renshaw that Petty would not come.

Lt. Renshaw then went on board the said brig.

He then asked Petty if he was not going on board of the gun-boat. He answered, that he would be damned if ever they got him on board of the gun-boat again; Lt. Renshaw then asked if he was going to leave him in a harbour from which he did not know how to pilot himself out. Petty told him he might go out as he could for what he cared. Lt. Renshaw told him to be careful what he was about; that he had piloted one of the United States gun-boats into a harbour, and that he should conduct her out again, as there was no person on board who could pilot her. He said he did not care. Lt. Renshaw told him he would give him ten dollars if he would come on board and pilot the boat out, and that he should proceed immediately to Fire Inlet to get his own man. Petty said he would not go. Lt. Renshaw said he should go, at the same time going up towards him, and Petty immediately pushed him back, and when Lt. Renshaw came up a second time, Petty caught hold of him and pushed him over a carpenter's bench. Lt. Renshaw then ordered the gunner and myself to take hold of Petty, which we did, and told him that he should not strike Lt. Renshaw. We used no violence, but warned him if he resorted to any, we should also.

Saw one of the men with a large maul raised behind Lt. Renshaw to strike him; another man had a saw, and two or three others were armed with billets of wood, some of whom had every appearance of intoxication. Lt. Renshaw then told Petty, if he would not go with him, he would go on board the gun-boat and bring

more men to take him. Petty told him he might bring all the men; he would not go on board the boat again. We then went on board the gun-boat, and in about an hour went in the boat with Lt. Renshaw to Fire Island, in search of Perkins, the marine, who had been left on board the *Speedy* in the place of Petty. When he got to Petty's schooner we found Petty on board, and the man who had raised the maul. Lt. Renshaw went into the cabin with Petty, and what took place there I do not know. Petty asked me down to drink something. At that time there did not appear any animosity between Lt. Renshaw and Petty. One of the men on board of Petty gave us some corn at our departure. We then left them, and saw no further of Petty.

Did not hear Petty express any dissatisfaction at being on board the gun-boat or of any treatment he received whilst

there. Heard Petty damn the wind and wish he was on board his own vessel at Fire Inlet, but did not hear him express any dissatisfaction at his treatment. When he was asked to eat forward he would reply, to use his own words, "He was waiting for a cabin snack."

John Thompson: Am private. I think he came voluntarily; I heard no threats used. Lt. Renshaw told Petty he should not want for men to work his vessel in. He came down forward one afternoon and saw a pair of feet irons and asked what they were. I told him what they were and he took one of them and put it on his leg and I put on the other. He jumped about, laughing, and said he could make no hand of them; he did not keep them on more than five minutes.

Peter Perkins, Private, and *Edward Ashmore*, Ordinary Seaman, corroborated the other witnesses.

September 28.

The inquiry closed today. THE PRESIDENT stated that the evidence and the report of the Court would be sent to the Department of the Navy.

Navy Department, 18th October, 1808.

SIR: Your letter of the 30th ultimo, enclosing the proceedings of the Court of Enquiry in the case of Lieut. Renshaw, has been received.

It affords me pleasure to find that no further proceedings are necessary in this case.

I have the honour to be, respectfully, sir, your obedient servant,

R. SMITH.

Commodore John Rodgers, New York.

THE TRIAL OF LIEUTENANT JAMES RENSHAW FOR SENDING A CHALLENGE TO A DUEL, NEW YORK CITY, 1809.

THE NARRATIVE.

Not content with suing the commander of the gun-boat for damages, Captain Petty's lawyer, Joseph Strong, must needs print again the offensive statement, but add to it a very strong comment of his own. He called on the public to resent the wanton acts of cruelty, inflicted by a petty stripling in command upon one of its own citizens within a few miles of his own door. He said the lieutenant was a man who "feels power and forgets rights" and as he had been guilty of other acts of cruelty, not up to this time mentioned, it was to be hoped that the culprit would be at once removed from his office and be made to pay ample damages for his acts.

An officer of the United States Navy could not be expected to remain silent, and a few days later he instructed a fellow officer to demand satisfaction. Strong, understanding that this meant to fight him, said that he was opposed to duelling, whereupon a much stronger note was sent by the lieutenant, and on Strong still refusing to do anything, he published the whole correspondence and posted the lawyer as a coward in these words: "With the cowardice which always marks the assassin, he positively refused the reparation demanded. My duty, therefore as an officer and a man, requires of me to publish Joseph Strong, attorney at law, as an infamous, evasive coward, and a malignant scoundrel, and I have only to regret that I have been prohibited by Commodore Rodgers from inflicting on him that personal chastisement to which he is so amply entitled."

Strong's only answer to this was to prosecute him under the New York statute for the offense of giving a challenge to fight a duel. On the trial some very able speeches were made by counsel, but the jury did not take long to render a verdict of not guilty.

THE TRIAL.¹

*In the Court of Oyer and Terminer, New York City,
January, 1809.*

HON. JOSEPH C. YATES,² Judge.

SAMUEL M. HOPKINS }

JAMES DRAKE } Aldermen.

January 14.

Lieutenant James Renshaw of the United States Navy was indicted by the grand jury for sending a challenge to fight a duel to one Joseph Strong, a member of the New York bar. The statute of New York of April 2, 1803, provided as follows:

I. That any citizen of this state who shall hereafter give or accept a challenge to fight a duel, or shall actually fight a duel, although no death ensue, and the second or seconds of every person offending in the premises, shall be deemed and taken to be guilty of a high misdemeanor against the people of this state, and on conviction thereof, before any court of oyer and terminer and general gaol delivery, or the supreme court of this state, shall, for every such offence, be disqualified from holding any office of honour, profit or trust, and voting at any election within this state, for the term of twenty years.

II. That any citizen of this state who shall by word, writing, or otherwise, request or invite any person to meet him, with intent to fight a duel, and every citizen of this state who shall meet with intent to fight a duel; and every person knowingly being the bearer of any challenge or message sent with the intent aforesaid, shall be deemed guilty of the said offence, and on conviction thereof in either of the said courts, shall be subject to the disqualifications and punishment in manner aforesaid.

III. That if any person not being a citizen of this state, shall be

¹ *Bibliography.* "The Trial of Lieutenant Renshaw of the U. S. Navy. Indicted for Challenging Joseph Strong, Esq., attorney at law, to fight a duel. With the speeches of the learned counsel, Colden, Hoffman and Emmet. Taken in short-hand by William Sampson, Esq. With an appendix, containing the proceedings of the Naval Court of Enquiry, held by order of the Secretary of the Navy. New York. Published by Frank, White & Co., No. 132 Water Street. 1809."

² YATES, JOSEPH C. (1768-1837). Born and died in Schenectady, N. Y. Studied law and practiced there. Mayor of Schenectady, 1798-1808; state senator, 1806; judge Supreme Court, 1808-1822; Governor of New York, 1823-1825; a founder of Union Coll., 1795. See "Dictionary of American Biography (F. S. Drake) Boston, 1874.

convicted in any of the said courts of the aforesaid offence against this act, he shall be fined and imprisoned at the discretion of the court having cognizance thereof, not exceeding five hundred dollars, as a fine, and seven years imprisonment in the state prison at hard labour.

There were two indictments. The second was the same except that instead of the words *not* being a citizen, &c. it was laid thus: *being* a citizen, &c.

The trial began today.

He pleaded not guilty.

The jurors were: William Reese, John Darley, William Clarke, Gershom Smith, William Spaight, Robert Weir, Charles Cornell, Thomas W. Satterthwaite, John C. Shaw, John Cumberland, John G. Wendell, Garrit Wright.

Richard Riker,³ District Attorney General, and *Thomas A. Emmett*⁴ for the People; *Cadwallader D. Colden*⁵ and *Ogden Hoffman*,⁶ for the Defendant.

The prosecutor had been retained by David Petty to prosecute an action against the defendant for assault and false imprisonment. The charge having been made public, the Secretary of the Navy ordered a Court of Naval Inquiry to investigate and report to him. This tribunal did so, and declared that Lieutenant Renshaw was not guilty.

Mr. Strong printed in a newspaper the following letter:

Mr. Lewis, (*Editor of the Commercial Advertiser*)

"To those who will read (as I trust they will with abhorrence and detestation) the following statement of a few of the most wanton acts of cruelty, inflicted by a petty stripping in command, who *feels power and forgets right*," upon one of our own citizens, in the peaceable pursuits of his lawful business, within a few miles of his own door, now answer the plain question whether they are yet satisfied with the present embargo and gun-boat policy of our administration. I am informed that divers other acts of wanton abuse as well as cruelty ensued, which are not detailed in Capt. Petty's Protest, as irrelevant to his purposes. For myself, I want language to express my regret that such acts of oppression can with impunity be practiced upon our fellow-citizens, without a speedy and adequate resist-

³ See: 1 Am. St. Tr. 361.

⁴ See: 1 Am. St. Tr. 63.

⁵ See: 1 Am. St. Tr. 6.

⁶ See: 1 Am. St. Tr. 540.

ance. I trust, however, that in this instance, but one voice will be heard, and one general wish be expressed, that the culprit will, without delay, be removed from office; and that the abused captain will speedily be remunerated with ample damages by the verdict of a jury of his country, to which I think he may safely appeal.

"A CITIZEN."

To this letter was added the affidavit of Captain Petty. (See ante p. 651).

MR. RIKER'S OPENING.

Mr. Riker: Gentlemen—You are now sworn to try two several indictments against the defendant, Lieutenant James Renshaw. The offence charged in the one and the other is the same. But in the one he is stated to be a citizen of the state of New York, in the other that circumstance is not averred. The reason of there being two indictments is in the statute which provides a different punishment for those who are not citizens of the state from that which its citizens are subjected to. Each indictment charges the defendant in three several ways pursuant to the statute.

1st. That he did, by a certain writing, request and invite Mr. Strong to meet him with intent to fight a duel.

2d. That he gave him a challenge to fight.

3d. That he requested and invited him to meet him with intent to fight.

The evidence which I shall lay before you, in order to prove the truth of this charge, will be principally two letters of Mr. Renshaw, and the parol testimony of Mr. Strong himself, who will state upon oath what passed between him and Doctor Marshall, the second of Lieutenant Renshaw.

The first letter is in these words:

Navy Yard, New York, October 26, 1808.

SIR:

Some strictures on my character, which appeared in the *New York Commercial Advertiser*, of the 2d ultimo, signed "A Citizen," and which I am since informed by the editor of that paper, you are the author of, demands that I require of you an apology equal to your wanton, offensive aspersion of my reputation.

My conduct relative to the affair which induced you to take so indecorous and unjustifiable a liberty with my name, has been scrutinously investigated by a court of enquiry, composed of my

peers, and the proceedings of that court now published, shew how far I merited the censure imposed upon the public. I herewith send you the paper containing the proceedings of the court of enquiry referred to; and under an impression that you will feel no hesitation in making a full and satisfactory apology, I shall wait your answer until five o'clock tomorrow evening.

With due consideration, I am, &c,

(Signed)

JAMES RENSHAW,

Commanding U. S. Gun-Boat No. 40.

Joseph Strong, Esq.,
Attorney at Law, New York,
No. 49 Partition Street.

The other letter is as follows:

SIR:

The pointed disrespect which has been evinced by you to my communication of the 26th inst. induces me now to employ the service of my friend, Dr. Marshall of the U. S. Navy, as the medium of communication between us.

To this gentleman I have fully committed my sentiments in regard to the existing subject of controversy, and given him ample authority to act in such manner as may appear to him most conducive to my honor and feelings.

Your obedient servant,

(Signed)

JAMES RENSHAW.

Oct. 28, 1808.

Joseph Strong, Esq., Attorney at Law.

After these letters had passed, a third one was addressed to Mr. Strong written either by the defendant or by Dr. Marshall. This one is called in the language used on such occasions, posting him as a coward. All these communications I read from the newspapers, as it has been agreed that they shall be admitted in this way.

Mr. Riker read the third (see post p. 667).

THE EVIDENCE FOR THE PEOPLE.

Joseph Strong: Previous to the receipt of these letters, being employed as the attorney of Capt. David Petty, in a suit against Mr. Renshaw, I had a conversation with Mr. Van Hook, attorney for Mr. Renshaw, who requested

to know whether that suit could not be amicably settled. I stated that I was fully authorized by Capt. Petty to settle it; upon which Mr. Van Hook said he would send to Lieut. Renshaw provided I would promise he

should be free from arrest in coming to town. I pledged my honour that he should.

He never came, but instead I received the letter of October 26. To it I paid no attention, supposing that Mr. Van Hook had not yet seen Mr. Renshaw. The next day a man called on me, a boatman or marine. He questioned me whether I had any answer for Lieut. Renshaw. I heard nothing more till next day (the 28th). Dr. Marshall, then a stranger to me, called with the second letter. He said it was his business, though a painful task, to demand some honorable satisfaction. Asked him what that satisfaction was to be. The import was a challenge to meet him and fight him in a duel, because I had passed by his letter with such silent contempt; and also for the communication in the first paper. My words were, he mistakes his man, for I am in principle, against duelling. He pressed this thing and added that Mr. Renshaw could not get rid of it otherwise on account of the stigma it would leave upon his character. I represented to him the difference of our situations in society. He asked me for an apology. I said I was not prepared to answer him on that head, but I could not admit or deny the publication to be mine until after I had examined it.

It was then postponed till I should go to the printer, and the next day I was to admit or deny being the author of that piece. The same day I went down to the *Commercial Advertiser*. On the 29th Dr. Marshall came, accompanied by Mr. Van Hook, who pretended to say it was an accidental meeting. I was then asked whether I was ready to avow

myself the author of that piece under the name of a Citizen. I said yes. He then called upon me for an answer to the proposition of yesterday as to making an apology.

I considered it a challenge to meet and fight. Unquestionably—not so decidedly so, however, in the second interview as the first—not so very pointed on the second occasion. On the last it was rather by way of reference to the conversation of the day before. I said it was nothing to his credit, seeing we were so different in point of age, profession, situation, and responsibilities; I being a married man and the father of a family—he without wife or child. With all these inequalities it would tend nothing, I said, to his military fame to challenge one who declared himself adverse to duelling from principle, and determined not to fight. His reply was, I ought to do it in justice to Mr. Renshaw.

Cross - examined: Understood the words of Dr. Marshall to mean it a challenge to fight a duel, without other explanation than that either I should accept it or be punished. Dr. Marshall objected to any interview between me and Mr. Renshaw; that his honour was then in his (the Doctor's) hands as the second of Mr. Renshaw, and he said nothing could pass now but between him and me.

I understand, though I am no military or fighting man, that the challenged has the election. I however, did not enter into that, for I refused to fight at all. He conveyed to me a request or invitation that I should meet him to fight him. On the second day his use of words indicated a challenge, not so much. They were

referable to the expressions of the former day, but in substance they were the same.

When I met Mr. Van Hook in the street I had just parted from Mr. Marshall and I told him what had passed and used these words: Your man is chuck full of fight, or chaulk full of fight. I cannot recollect anything more at this interview. I think I was asked by Dr. Marshall whether I would make an apology. I mentioned the difference between us of our age, profession, family and so forth. He seemed to speak with a greater degree of warmth, and said he was astonished that there should be a man in the community that could make use of such a pretense as a shelter against meeting a gentleman whom he had offended. My answer was that I admitted myself

to be the author of the publication, yet that I would not fight. I proposed his taking a copy of the paper; his answer was that he thanked God he had a pretty good memory. The principal part Dr. Marshall took in the conversation was urging the propriety of the thing, and objecting to my reasons for not fighting, and in every sentence resounding the words "honourable meeting" and "honourable satisfaction," and such like terms. I still replied that I was not his man to fight. Neither sword nor pistol were mentioned. I would not fight him at all with sword or pistol. I do not think I should fight you otherwise than with my fist to knock you down in the street if I could, provided you insulted me.

Mr. Colden: Gentlemen—The defendant is on his trial on two indictments, in each of which he is charged with having, by writing or otherwise, invited Mr. Strong to meet him with intent to fight a duel. It is now my duty to apprise you of the defence which is to be offered on behalf of Lieut. Renshaw. As to the written challenge, the paper, which is called such by the counsel for the prosecution, and the written and other printed documents which relate to it, are before you. Fortunately there can be no misrepresentation with respect to the language. I trust that it will not be difficult to shew you, that there is nothing in the publications themselves which imports a challenge, and to satisfy you that no challenge was intended. As to the rest, Mr. Renshaw's defence is explained in a single sentence, which painful as it is to me to utter, my duty obliges me to express in such terms as that it cannot be misunderstood. It is, gentlemen, that the witness for the prosecution is not to be credited. It is with regret that I find myself constrained, in justice to my client, to put his defence on this ground. Mr. Strong has very exalted ideas of profes-

sional duty and privilege upon this occasion. I shall endeavour to act under a due sense of the first. And notwithstanding Mr. Strong's threat to break my head, I shall avail myself of the latter as far as may be necessary. But I wish it to be understood, that for what I say in court I hold myself answerable out of it, and that I shall only claim as a privilege the protection of the court as long as I am in court. At least it seems incumbent on me to take care that there shall be no reason to suppose that I have left anything unsaid through dread of Mr. Strong's unprovoked threat. He has manifested by this conduct in this prosecution that he is an interested witness; we shall show you by his own writing that he entertains sentiments inconsistent with candor and truth; that these same writings are inconsistent with Mr. Strong's present relation; that he has made declarations utterly at variance with the testimony he now gives; and lastly, gentlemen, he will be contradicted in all that relates to the last interview between him and Dr. Marshall by a witness at least as respectable as Mr. Strong himself, who was present during the whole of that interview. If you find that the second interview has been misrepresented, it must destroy the credit of the whole of Mr. Strong's relation; if he was wrong in one instance he may have been so as to the rest.

As to the two indictments, one of them avers that when the defendant committed the offence he was a citizen of the state of New York. The other that at the same time he was not a citizen of the state of New York. It is manifest that the defendant cannot be convicted on both. But if a verdict is to be pronounced against him it is of the greatest importance to the defendant on which indictment he is found guilty; if he should be convicted on the first the only penalty is disfranchisement for a certain number of years; but if on the last he is liable to pay a fine of five hundred dollars, and to be imprisoned in the State Prison for seven years.

It is very important to see whether Mr. Renshaw is a citizen of New York or not. He has been domiciliated here for many months, and the word citizen in the act can only be taken to refer to the domicile of the offender. For every citizen

of the United States, by becoming a resident in any state, becomes a citizen of that state, and is no longer a citizen of the state from whence he removed; and if Mr. Renshaw, in consequence of his residence here, is not a citizen of the state of New York, inasmuch as he is not a resident of any other state, it would follow that he is not a citizen of the United States.

Mr. Colden then read the publication signed James Renshaw, which had before been read by the Attorney General:

To the justice of this appeal on his courage, and which was again repeated by my friend in still stronger terms, he was equally insensible, and with that cowardice which always marks an assassin, he *positively* refused the reparation demanded. My duty, therefore, as an officer and a man, requires of me to publish Joseph Strong, attorney at law, as an infamous, evasive coward, and a malignant scoundrel, and I have only to regret, that I have been prohibited by Commodore Rodgers, from inflicting on him that *personal chastisement* to which he is so *amply* entitled.

(Signed)

JAMES RENSHAW,
Lieut. U. S. Navy.

In justification of the above declaration of Lieutenant Renshaw, and that the public may possess all the circumstances which have occurred, I conceive it a duty I owe to Lieutenant Renshaw, as his friend in this business, to the government under which I have the honor to hold a commission, and to society, to publish the annexed statement, written by Joseph Strong, attorney at law, and acknowledged by him to be the basis of his conduct to Lieutenant Renshaw. It may not be improper to observe, that it was in the first instance the wish of Mr. Strong, that this statement should be considered as a *private* communication, intended only for the eyes of Lieutenant Renshaw and his *immediate* friends, and that on my objecting to these terms, it was placed in my possession to make such use of it as I should deem proper. I therefore feel no hesitation in placing it before the public, and shall take the liberty to offer such strictures on the different parts of it as may appear admissible, and consistent with impartial justice.

(Signed)

SAMUEL R. MARSHALL.

STRONG'S DEFENSE.

1st. Lieutenant Renshaw's first communication was not answered or regarded, because of the previous overtures of Mr. Van Hook as his friend—and whether accidental or voluntary, and unknown to Lieutenant Renshaw, is the same thing, after Mr. Strong had pledged his word to him.

2. As to the remarks of Mr. Strong (accompanying the protest)

these were *founded wholly* upon the facts stated therein, (and others not therein mentioned, as alleged by Captain Petty) upon a *full conviction* of the *truth* thereof. And *did not proceed* from any *personal* disrespect towards Lieut. Renshaw, (then and now an entire stranger) but were *only politically* intended, as reprobating the *policy* of the government relative to the *gun-boat system* of national defense, herein operating as a ground of private grievance.

3d. Mr. Strong is not now prepared to admit or deny the facts stated in that protest, *the proceedings of the court of inquiry* relating thereto, being only *exparte*—and an apology, if *any eventually* can be required, cannot with propriety be made, until a *full investigation* has taken place in a court of justice, or the prosecution pending shall be settled and adjusted between the parties.

4th. Mr. Strong *avows not to have* any or the *least personal* disrespect for or towards Lieut. Renshaw—and hereafter, if on a full and impartial investigation of the facts before a *court of law* it should appear to him that his *impressions* in respect to them were erroneous, he will freely and with pleasure retract anything *he may deem personal*.

5th. Should the remarks complained of by Lieut. Renshaw, (or his friends) be even considered to be harsh, or improper, still Mr. Strong, as the attorney of Capt. Petty, ought not (at this time pending his suit) to admit or deny any thing relating thereto as now required of him. He does not *claim* this as *his privilege* only, but asserts a *liability* professionally, in case of any *publicity*, and deems all publication improper and *illegal*. What has been made must be also deemed so and *expected to undergo judicial notice*.

To the first article of this *infamous* declaration, I shall pay no attention; and sincerely wish that my duty to my friend and the public, would allow me to pass over the remaining articles with the same contemptuous indifference.

Cold indeed must be that heart, and insensible to feeling and honor, that can read without indignation the second article of this base and wanton confession. That an innocent man should be sacrificed to *political* interest—that an officer under the commission of the United States should be chosen as the instrument for the purpose of villifying the administration under which he served, was an act of unexampled baseness, of which no other man than Joseph Strong, *Attorney at Law*, could possibly have been guilty. Assassins may now sleep in security, since the expounders of the law have become the assassins of reputation. Even while I write, my heart feels indignant that I should be of the same species with such a man! But with what front, I would ask, can he in future, as a member of the law, (a base one indeed) demand justice on a criminal, when he himself stands charged with one of the greatest enormities of which man can be guilty? The thief, who filches the glittering ore of avarice to minister to his necessities, and the assassin who, under the cover of night, seeks incense to his revenge in the blood of his enemy, are not so dangerous to the public, as the man who, sheltered under the garb of sanctity and virtue, clandestinely endeavours to stab the reputation of an innocent and honest man.

I will not for a moment degrade human nature by supposing that Mr. Strong has acted under the authority of the party he espouses; or that there is an *honest man* in that party, who would shelter him from the infamy and disgrace which he has so wantonly incurred. To the feelings of every *true American* I address myself on this subject, and feel confident that in whatever party they may be classed, they will not hesitate with the virtuous indignation of Iago's wife, to call for

—"A whip.

"To lash the rascal naked through the world:

"Even from the east to the west."

In investigating the third article, I will not attempt to follow Mr. Strong in the technical phrases of his profession, nor in the tautology of his language, for which, *perhaps*, he may also have a professional license. My only object is to prove that his trifling excuse for not making immediate reparation to Lieut. Renshaw is false, evasive, and absurd. Did not Mr. Strong exceed his professional duty to his client, when he volunteered himself before the public, for *political purposes*, as the assassin of Lieut. Renshaw's reputation? Could an apology, then, for what he did as an individual, have had the *smallest* unfavourable effect on the part of his client? I think not—and I am also certain that Joseph Strong, *attorney at law*, thinks so too; but obstinacy must have an excuse for cowardice.

There never was a villain who suffered under the hands of the executioner, who might not, with equal propriety, have found an excuse for the act which led to his fate. Joseph Strong is "*an honourable man*," and an *attorney at law*.

In the commencement of Mr. Strong's fourth article, he "avows not to have any, or the least personal disrespect for, or towards Lieut. Renshaw." But how can we reconcile this declaration with Mr. Strong's remarks, signed "A Citizen," and his subsequent conduct when atonement was demanded for the injury sustained? Do these circumstances prove the correctness of Mr. Strong's avowal? Do they not rather prove Lieut. Renshaw the "greater saint, and he the blacker devil?"

It would be inconsistent, however, with the respect I owe to the public, to encroach further on their time in exposing the contradictions and absurdities of a man whose whole conduct in this affair has been one tissue of folly. I shall therefore take my leave of Joseph Strong, attorney at law, with observing that a reply from him will not be requested, as he has, by his *ungentlemanly* conduct, rendered himself unworthy the notice of

(Signed)

SAMUEL R. MARSHALL,

Brooklyn, 4th Nov., 1808.

Surgeon U. S. Navy.

Mr. Colden proposed to examine Doctor Marshall, which was objected to by Mr. Emmet upon the ground that he himself

being indicted for conveying the challenge, he was interested to prove that no challenge was intended.

THE EVIDENCE FOR THE DEFENDANT.

THE COURT allowed the objection.

Mr. Vanhook: On 26th October was in Mr. Strong's office and saw some papers upon his desk touching the suit he had brought for Petty against Lieutenant Renshaw. Made some observations relative to the protest of Petty. Mr. Strong used some harsh expressions relative to Mr. Renshaw, such as calling him a "rascal, scoundrel, coward" and others of the same import. I said to him that I should be sorry to repeat them to Mr. Renshaw, as from my knowledge of him I was certain he would call on him. When I next saw Mr. Strong, and made him the proposition just mentioned, to which he assented. I informed him that it was totally unauthorized by Mr. Renshaw, and that I only made it as his friend, with a hope of being able to settle this business amicably. I was at this time an entire stranger to the circumstance of Mr. Strong and Mr. Renshaw having any private dispute, or that the former gentleman had taken any part against Mr. Renshaw, other than in his professional character as the attorney of Petty. On that day I could not go to the Navy Yard; the next I was prevented from going by the wind, and by my attendance in court as a witness. On Friday afternoon I met Mr. Strong at the corner of Pine and Nassau streets. He appeared to be in haste, but made a stop, and said, "I have heard from your friend Renshaw; he is

chuck full of fight." This remark induced me to believe that he had challenged Mr. Strong; and I immediately said, "What, he has not challenged you, has he?" Strong replied, "Why, no, not quite that, but he is full of fight." I told him I had not been able to go to the Navy Yard, but would certainly go to-morrow. The next day I went and saw Mr. Renshaw, and explained to him the object of my visit. He referred me to Dr. Marshall, who told me the occurrences of the day before, and that he was again to call there that day. I cautioned him, that if nothing had passed at his first interview with Mr. Strong, that he must be careful not to suffer himself to say anything that might be *tortured* by him to a challenge, and stating, that from my knowledge of Mr. Strong's character, I was certain he would not fight if challenged; but, on the contrary, would commence a prosecution under the law.

I afterwards at his request went to Mr. Strong's office to witness the conversation that might there take place. I did not then say to Mr. Strong that my meeting Dr. Marshall there was accidental. The Doctor asked Mr. Strong if he was prepared to give an answer. He said he was willing to admit himself the author of the publication, "A Citizen"; that there was some variation from the manuscript, such as substituting the letter I for the word *we*, but in substance it was his publication. Dr. Marshall then

wished to know if he was willing to make an apology. He replied, no, that although he would not do so, he would not fight; for though he did not want courage, he considered himself as Mr. Renshaw's superior, and urged his family, profession, age and standing in society as his reasons for not fighting. Dr. Marshall then attempted to convince him that it was more courageous for a man to confess his faults than to persevere in them and fight for them. Mr. Strong said he would not give him an apology; he had prepared a paper as the basis of an amicable settlement of the controversy between Petty and Renshaw, and that after that he would have no objections to making an apology. He then read the paper. Mr. Strong objected to an apology because it might prejudice the cause of his client. He said it might be settled upon payment of money, but whether one thousand or five hundred dollars would be taken, he would not mention the sum. Much conversation took place between Dr. Marshall and Mr. Strong without effect, and we prepared to leave his office. Then said Dr. Marshall, "Do you think, sir, that a gentleman wounding the feelings of another ought not to make him honorable satisfaction?" Mr. Strong said, "I do not know what you mean by honorable satisfaction; it may be given in a room; but if you mean fighting, Doctor, I am not your man for the reasons I have already given." Dr. Marshall then said that it was his duty to apprise him, that if he would not make Mr. Renshaw an apology he must expect to meet the effects of his displeasure. Mr.

Strong said he hoped there would be no combination against him. Dr. Marshall seemed indignant that he should be supposed capable of being a friend of a man that could combine with others for any dishonorable purpose, and so expressed himself.

THE COURT: Was there any question touching a challenge? If I understand the English language, there certainly was nothing in the world. I think if there had, I should have understood it as well as any other gentleman now present. Dr. Marshall said to Mr. Strong, "I understand then, sir, that you avow yourself the author and refuse an apology. Do you not think that a gentleman so situate ought to give honorable satisfaction?" He then appealed to Mr. Strong whether his conduct had not been proper and amicable during the whole transaction. Mr. Strong answered that it had been gentlemanly and amicable throughout and he was sorry it had not had its effect. On going out Dr. Marshall asked me if anything he had said could be construed into a challenge. I said, no, it could not.

Cross-examined: There was nothing at the second conversation that could import a challenge. Dr. Marshall said a great deal of pains had been taken by party editors to make a breach between the officers and the citizens, and that it was better and his wish to heal it rather than to widen it.

Mr. Strong said he was a father and Dr. Marshall answered, and I also have a family, but a man should not do anything to injure the feelings of a gentleman and then shelter himself under that pretence.

Mr. Strong: It is true enough, I did not at first know that I had to do with a snake that would so soon turn and bite me.

The Court interposed and desired that there should be no such interruptions.

Commodore Rodgers: The officers said it was their intention to demand of Mr. Strong an apology, and if he refused that to bring him before the public in such a way that if there was any challenge it might come from himself. I advised Dr. Marshall to take with him some person versed in the law, that he might not through incautiousness, commit himself; for if Mr. Strong should not be an honorable man he might be committed.

Those notes were sent by my consent expressly upon the opin-

ion that they could not amount to a challenge. I did not think they were meant as a challenge, but knew that Mr. Strong was a lawyer and thought it best that if he did not make an apology he himself should be obliged to come forward. Lieut. Renshaw was stationed in New York at the U. S. Navy Yard. He was seven or eight years in that service; had been a year stationed there, occasionally boarding in New York and sometimes in Brooklyn.

It was proposed to call witnesses to the good character of Dr. Marshall, which was overruled, as his character was not in issue, nor in any manner impeached.

Charles Graham: I studied law in the same office with Mr. Van Hook and was his most intimate acquaintance. He was always remarkably exact. I have never known him to make the most ordinary or the most trifling mistake. As to Mr. Strong's character in that respect, I have never had any particular acquaintance with him, so as to judge.

THE COURT: Gentlemen, you are the best judges of the course you take; but I do not see the importance of this testimony.

Stephen Price: Am a counselor at law. Have known Mr. Van Hook seven or eight years. He is in all his dealings true and correct, and that is his character.

THE COURT: I think this seems admitted. Is it necessary to go further?

Mr. Colden: Do you know Mr. Strong's character?

I should say that his character is different from that of Mr. Van Hook. Do not look upon Mr. Strong as a respectable man. He is a man with whom I wish to have nothing to do.

THE COURT: What is the general reputation of Mr. Strong as to veracity?

A great many people speak ill of him; that is his general character as far as I know.

Mr. Colden: How is he estimated by the gentlemen of the bar?

In that respect also I take them to be two very different men.

Cross-examined: Have found him disagreeable in business; but I don't see how I could have a quarrel with Mr. Strong.

Alpheus Sherman: Am counselor at law. Have been four or

five years acquainted with Mr. Strong. In any difference between him and Mr. Van Hook, I should give the preference to the veracity of the latter gentleman.

Cross - examined: There has been a dispute between Mr. Strong and myself in relation to professional business.

Benjamin Ferris: Am High Sheriff of New York. Mr. Strong did business for a length of time in the same office with me, and was always very cautious and

very correct, particularly in drawing up affidavits.

Albert Herring: Am counsellor at law. Many gentlemen of the bar had disputes with Mr. Strong on account of his warm or passionate disposition, but would give as much credit to his affidavit as to that of any other person whatsoever.

Mr. James Anderson: Have known Mr. Strong two or three years—never heard anything to impeach his character till today.

Mr. Colden: Feeling that the cases which you are now to decide depends entirely upon the testimony of Mr. Strong, I cannot proceed without once more expressing a sincere regret that I have now to discharge the painful duty of examining what credit is due to that testimony.

I think it must appear to you that neither of the notes from Mr. Renshaw to Mr. Strong are in themselves a challenge, and that the other publication of Mr. Renshaw, so far from importing that he intended either of the notes as a challenge, or that he had authorized Dr. Marshall to invite Mr. Strong to meet him to fight a duel, shew that Mr. Renshaw had no other design than to induce Mr. Strong to make him reparation by a public acknowledgment and apology, and to apprise him that if he did not, in this respect, act honourably, he must expect the vengeance of the man he has so grossly and wantonly injured.

And yet what are the words of this note, which can be tortured by the ingenuity and ability of the learned counsel opposed to me, into an invitation to fight a duel? Is this a challenge, because Mr. Renshaw says he has authorized Dr. Marshall to act in such manner as may appear to him most conducive to his honour and feelings? When you refer to Mr. Renshaw's first note, and find that his only object was to obtain an apology from Mr. Strong, is it not more reasonable to suppose, that he meant that Mr. Strong should understand from this last note, that as he (Mr. Strong) had not thought proper to give an answer to his first letter, he had

now employed his friend, Dr. Marshall, to be the medium of communication between them: that through Dr. Marshall he meant still to insist on an apology from Mr. Strong, and that as to the nature and extent of that apology, he had fully committed himself to Dr. Marshall, and had left him to act in that respect as he might think proper. I ask again, is not this a much more reasonable construction to put upon this note, than by violating its terms, to construe it into a challenge? Again Dr. Marshall was to act as might be most conducive to the honour and feelings of Lieutenant Renshaw. Certainly that which would be most conducive to the honour and feelings of Mr. Renshaw would not have been to fight Mr. Strong. I do not believe that Mr. Renshaw, more than any other man, though by profession a soldier, likes fighting merely for fighting's sake. We may therefore believe, that as an apology would have been as conducive to the honour of Mr. Renshaw as a duel, it would have been as agreeable to his feelings; and that therefore when Mr. Renshaw says to Dr. Marshall, "Act as may appear to you most conducive to my honour and feelings," he intended that Dr. Marshall should act so as to procure from Mr. Strong an apology.

But, gentlemen, if this note be a challenge, I do not know what may not be taken for one. And if this prosecution is successful, I shall not be surprised to see some of our fair ladies sent to the bar, to answer for this offence, and to see a card of invitation to tea, brought in evidence against her to prove that she really intended by it an invitation to her neighbour to fight a duel.

But if we consider this note in connection with the testimony of *Commodore Rodgers*, can there be a doubt as to what Mr. Renshaw intended by it? You find that the Commodore as well as Mr. Renshaw and his friend, had formed a pretty just estimate of the character of Mr. Strong. They foresaw what would be the course he would pursue if Mr. Renshaw or his friend should put themselves in Mr. Strong's power; they knew him to be a member of the law, and knew that he would not hesitate to avail himself of the law for protection or persecution.

If Mr. Renshaw, after his acquittal by the Court of Inquiry, had suffered the thing to remain there without seeking an explanation or apology from Mr. Strong, he would have been disgraced in his profession. The Commodore was determined that the honour and reputation of his young soldier should not be sacrificed to the aspersions of Mr. Strong; at the same time he was resolved that Mr. Strong should not have it in his power to make him a victim of the laws. The commodore's design was that Mr. Renshaw should do any thing that he might legally do for the preservation of his military character—that he should place himself in such a situation that there could be no doubt of his courage, or of Mr. Strong's want of it—that this should be done by a note which while it was not an invitation to fight, might intimate to Mr. Strong that Mr. Renshaw was very willing to meet him if he (Mr. Strong) could be provoked to send him a challenge. With these views and designs Commodore Rodgers read the note and advised its being sent; and at the same time, in his conversation with Doctor Marshall, cautioned him very particularly against putting himself or his friend in the power of Mr. Strong, by saying anything to him that could by any possibility be taken for a challenge. I think you cannot hesitate to say, that the note does not in itself import a challenge, and that there is no evidence before you that it was intended as one; but, on the contrary, that there is evidence that Mr. Renshaw never had a design to challenge Mr. Strong, though he may have been anxious to provoke Mr. Strong to challenge him.

Perhaps a rigid moralist would say there is as much offence in endeavouring to provoke a man to give a challenge, as there is in directly inviting him to fight a duel. This is a case of conscience which it is not my business to discuss. It is sufficient for me to know, that in a court of law the things must be considered as distinct, and you cannot convict the defendant of giving a challenge, if you should believe that he only intended to provoke another to send him a challenge.

If this note was a challenge to fight a duel, where was the

meeting to take place? When and with what arms were they to fight? All these things are necessary preliminaries to a duel; and if no arrangements of this sort were made by the note, then the note of itself is not a challenge. Whether the omission of these things in the note were supplied by parol communications from Dr. Marshall, which we admit they might have been, you will perceive is not to be considered just now.

Let us turn to Mr. Renshaw's communication to the public, which is called the posting of Mr. Strong, and to Dr. Marshall's observations upon it, which have been read to you not only as evidence that the note of Mr. Renshaw was intended as a challenge, but that a challenge was given by Mr. Renshaw through his friend Dr. Marshall.

In that part of the appeal to the public which is under the signature of Mr. Renshaw, adverting to the note which has just been considered, Mr. Renshaw says, "To the justice of this appeal to his courage, which was again repeated by my friend in still stronger terms, he was equally insensible," &c. "he positively refused the *reparation demanded*," &c. "I therefore publish Joseph Strong, attorney at law, as an evasive coward," &c.

Before the counsel for the prosecution can have the advantage they expect from these publications, they have this very difficult task to perform; that is, they are to persuade you that there can be no other appeal to a man's courage than to ask him to fight; that to demand reparation for any injury, is to demand of a man that he will take his chance of shooting you; and that no man can be an "evasive coward and a scoundrel," but one who has refused a challenge.

I do not believe, however, that you will very readily adopt such sentiments. I rather hope that you will agree with me, that true courage consists in daring to acknowledge an error, and to do justice to those who we may have wronged. If Mr. Strong had basely and wantonly slandered Mr. Renshaw, if when he had before him proofs of the innocence of Mr. Renshaw, he dared not do away the slander and make him an apology for fear of the injury it might do his own reputation,

it was arrant cowardice. And if an acknowledgment and apology so justly due to Lieut. Renshaw was denied under the pretence of professional duty and privilege, what is he who avails himself of so pitiful a subterfuge but an "evasive coward?" Believe me, gentlemen, there are many men who would undauntedly expose their breasts to the muzzle of a pistol, or brave danger "even at the cannon's mouth," who would not have courage to humble themselves to an acknowledgment of an error. But it was this magnanimity, this noble courage which Mr. Renshaw expected to find in Mr. Strong, but he found Mr. Strong destitute of it, and it was not because Mr. Strong would not accept a challenge, not because he would not fight a duel, that Mr. Renshaw called him coward, an evasive coward.

I expect by and by to hear it said by the counsel for the prosecution, that there are certain terms in these publications which, when used on an occasion of this sort, have a different meaning from that which they ordinarily bear, that the schools of honour have a language of their own. Not having been nor wishing to be a graduate in those schools, where I believe, unhappily for mankind, many principles of false honour are taught, I cannot pretend to be a scholar in their language. But, gentlemen, if the words coward and courage may bear a different signification from that in which I say Lieut. Renshaw used them, what is to become of the word *reparation*, which is more than once used in these publications, in reference to the demand which Mr. Renshaw had made on Mr. Strong?

Mr. Renshaw, in his publication, says Mr. Strong refused the *reparation* demanded, and Doctor Marshall, in that part of the publication which is under his signature, says he only wishes to prove that Mr. Strong's excuse for not making *reparation* to Lieut. Renshaw is evasive. Now if the demand which Mr. Strong refused had been to fight, could it have been said that he refused *reparation*? I don't see well how a person who fights me can be said to make me *reparation*, particularly as he may chance to hit and I to miss, and then I should certainly have very bad *reparation*; and so I cannot

see very well how one who refuses to fight me can be said to refuse me *reparation*. But if a man has slandered me and I ask him to do me justice by an acknowledgment and apology, then indeed I ask him for reparation; and if he complies with my request, he then makes me reparation because he does away the slander and leaves me the enjoyment of an unsullied character.

If it had been said that Mr. Strong had refused to give Mr. Renshaw *satisfaction* it would have been a word much more apt to convey the meaning that the counsel for the prosecution wish to give to the word reparation; and the use of the word *satisfaction*, in relation to duelling, is so appropriate that it is highly improbable that Mr. Renshaw and Doctor Marshall would have availed themselves of any other, if they had meant to say that Mr. Strong had refused to fight.

We must now consider the parol testimony of Lawyer Strong, and in doing this I shall take in connection with it the very curious, I had nearly said the very infamous, piece which appeared under the signature of Mr. Strong, and was given by him to Doctor Marshall at the second interview between them. Mr. Strong's testimony is very explicit. He says, at the first interview between him and Doctor Marshall, Doctor Marshall repeatedly and explicitly invited him to meet Mr. Renshaw to fight a duel. If you believe Mr. Strong, and then can further believe, that Mr. Renshaw authorized Doctor Marshall to give Mr. Strong this invitation, of which, however, we insist there is no evidence, then indeed, gentlemen, there is an end of the cause and you must find the defendant guilty. We were in hopes that this part of the case would not have solely rested on Mr. Strong's testimony. But I must again remark how unfortunate for us it is that the only person who could corroborate or invalidate the testimony of Mr. Strong, has, on account of technical objection, been excluded as a witness; therefore as to what passed at the first interview we can only appeal to Mr. Strong; and if, gentlemen, you shall think that in some part of his testimony he has been a pretty good witness for the prosecution, we hope

to shew you that in certain other parts he has been no very bad one for the defendant.

Mr. Strong says that Doctor Marshall challenged him in the early part of the first interview between them, and yet he admits that Doctor Marshall's first demand was to know from Mr. Strong whether he was or was not the author of a piece against Mr. Renshaw, which had appeared in the papers under the signature of 'A Citizen;' that he, Mr. Strong, refused to avow or deny that he was the author of that piece until he should have had an opportunity of examining the file of papers in which it was printed. That Doctor Marshall, to give him time to make this examination, left him, after having made an appointment with Mr. Strong to meet him the next day, when Mr. Strong was to say whether he was or was not the author of the piece in question; and if he acknowledged himself to be the author then he was to say whether he would or would not make such an apology as would be most conducive to the honour and feelings of Mr. Renshaw.

It must be always remembered that there is not the least pretense that there was any other cause of controversy between Mr. Strong and Mr. Renshaw than that Mr. Renshaw suspected him to be the author of the piece signed 'A Citizen.' Now as it is admitted that one object at least of Doctor Marshall's visit to Mr. Strong was to ascertain whether he had or had not published this piece; and as he gave Mr. Strong time to give his answer on this subject, is it not most unnatural to suppose that Mr. Strong acknowledged himself to be the author, and before Mr. Strong had given him any answer, and before he had refused to make an apology, that Dr. Marshall should have challenged him? To suppose this we must imagine that Dr. Marshall addressed Mr. Strong in words like these, "Sir, Lieutenant Renshaw suspects that you are the author of the piece signed 'A Citizen,' I call upon you as his friend to know whether you are or are not the author, and if you are I demand an apology of you. But whether you are or are not the author, and whether you will or will not make an apology, you must fight Lieutenant Renshaw—I will

give you till to-morrow to avow or deny the piece and to determine whether you will or will not make an apology—but yet I now challenge you to fight Lieutenant Renshaw.”

Can you, gentlemen, believe that Doctor Marshall’s conduct was so senseless and absurd?

And here, gentlemen, let me call to your recollection the declaration Mr. Strong made to Mr. Vanhook, when Mr. Vanhook met him in the street, after he had had the first interview with Doctor Marshall, at which interview he says he received the challenge. On meeting Mr. Vanhook, Mr. Strong says to him, “Well, I have seen Doctor Marshall; your man is chuck full of fight.” “What, has he challenged you?” says Mr. Van Hook. “No, not quite that,” was the reply of Mr. Strong. Now if you believe Mr. Vanhook, is not Mr. Strong in contradiction with himself? Mr. Strong, to be sure, does not recollect the latter part of this conversation; and probably you will be told that the conversation took place at a time when Mr. Strong’s mind was loaded with the variety and importance of his professional concerns; that it was made at a time when he was driving through the streets hunting up some sheriff, or looking out some miserable wretch for sheriff’s prey; and that therefore it was a heedless conversation and made no impression on the mind of Mr. Strong—For I do not believe that there will be an attempt to impeach the credibility of Mr. Van Hook.

I will not, gentlemen, waste your time by anticipating arguments of this kind. When I consider to whom they will be addressed, I have no fears as to their effect, should they be resorted to by the adverse counsel.

If we take into consideration what passed at the second interview, even according to the relation of Mr. Strong, we shall find many circumstances which must tend to shew that no challenge was given at the first interview, and which, as it seems to me, prove that Mr. Strong till lately never entertained an idea that Dr. Marshall challenged him when they met the first time. In the first place, Dr. Marshall’s second visit to Mr. Strong, and Mr. Strong then offering any apology at all, are utterly inconsistent with the fact of his having re-

ceived a peremptory unconditional challenge before that time. But the language of this apology itself is directly at variance with the idea of a previous challenge having been given. To make this appear to you, gentlemen, I will read to you this very curious production; and that I may not be under the necessity of recurring to so disgusting a performance again, I shall, as I proceed in the reading, make some observations on its style and language. These observations I shall apply at another time; for my present purpose is only to make you observe that Mr. Strong, when he wrote this piece, could not have supposed that he had been challenged.

First, let it be remarked, that Mr. Strong is a member of a learned profession; of course a scholar; part of his profession is the science of special pleading, to excel in which it is necessary to weigh with the most scrupulous exactness the meaning of every word that is put on paper. If Mr. Strong was in the right use of his senses when he wrote this piece, we may expect to find upon it some marks of his professional skill. Let us examine it.

To the first paragraph, I have nothing to say but that it is not intelligible. The second paragraph is a rare specimen of original composition.

“As to the remarks of Mr. Strong (accompanying the protest) these were founded *wholly* on the facts stated therein, (and others not therein mentioned, as alleged by Captain Petty) upon full conviction of the truth thereof.” Now these are most curious remarks indeed, that have their whole foundation on certain facts, and yet are founded on some other facts besides those on which they are wholly founded. But which are the facts as to the truth of which Mr. Strong had a full conviction? Were they those upon which the remarks were wholly founded, or were they those upon which the remarks were not founded? It must have been the last, gentlemen, because if Mr. Strong did believe the facts stated in the protest, he never could have said as he has done in this same paragraph, that his remarks did not proceed from any personal disrespect to the character of Lieutenant Renshaw; and he could not have said as he has done again in the same

publication, "Mr. Strong avows not to have any or the least personal disrespect for or towards Lieutenant Renshaw."

No, gentlemen, the charges contained in that protest, and to which Mr. Strong attempted to give strength and currency by his remarks in the public papers, under an anonymous signature, were of so odious a nature, that no man who believed them could have a personal respect for Lieutenant Renshaw; but, on the contrary, he must have been considered, as long as these facts remained uncontradicted, as having violated the duties of his profession, as being regardless of the rights or liberties of his fellow citizens, and as wanting the common feelings of humanity.

I am sure you, and every honest man, be he of what party he may, will hear with indignation the next sentence. After having said that his remarks did not proceed from any disrespect to Lieutenant Renshaw, Mr. Strong says, that "they were only intended as reprobating the policy of government relative to the gun-boat system." I ask, gentlemen, your particular attention to this disgraceful confession, though it is not for the purpose of making use of it at present that it is now read.

"He does not claim this as his privilege only, but asserts a liability professionally in case of any publicity, and deems all publication improper and illegal. What has been made must be also deemed so, and expected to undergo judicial notice." This is certainly something more learned than English. It must be that language which I have heard of in my infancy, called Hebrew Greek.

Mr. Riker: These may perhaps be typographical errors.

Mr. Colden: It may be so. It is a pity the printer is not here to take some more of the errors of his performance on his shoulders. But, gentlemen, the style of this production is the least of my concern; it is the threat contained in the last sentence which I now wish you particularly to notice; and it is this which I think has warranted me in saying, that when Mr. Strong wrote his piece, which was after his first interview with Dr. Marshall, he did not suppose himself that he had been challenged.

Mr. Strong, after having swelled himself with the idea of his professional privileges, means to give Dr. Marshall to understand that he intends to institute a prosecution, on account of some publication. At this time nothing had been published on this subject which could give Mr. Strong offence, except the proceedings of the Court of Inquiry. This therefore is the publication which Lawyer Strong threatens with judicial notice.

Now if Mr. Strong at this time had thought that Mr. Renshaw and Dr. Marshall had exposed themselves to a prosecution, by giving a challenge, do you believe this lawyer would have threatened them with a suit for a libel, when he might have held out to them the terms of a prosecution which might have sent them to the state prison for the best part of their days? No, gentlemen, Mr. Strong at the time he wrote this piece, never thought that he had been challenged, and it was a thought that did not come into his head till after the publication made by Mr. Renshaw, when disgusted and mortified with the picture which was there drawn of his own conduct, he determined to have revenge on those who had so exposed him, and now seeks it by these prosecutions.

I shall at present say no more of this piece, than to beg you to consider the whole of it, the time when it was written, and to say whether it does not manifestly appear from it, that Mr. Strong, at the time he wrote it, meant it as that apology which Dr. Marshall had demanded of him, and that he had then no idea that Dr. Marshall had challenged him, or asked any thing more of him than an apology.

I shall say but little to you, gentlemen, as to what passed between Mr. Strong and Dr. Marshall at their second interview. We have not as to this the same reason to regret that we cannot have the benefit of Dr. Marshall's testimony, because Mr. Van Hook was present at the whole of this interview. He contradicts Mr. Strong as to all the essential parts of his testimony.

You will be told that it is your duty to endeavour to reconcile contradictory testimony; I admit it gentlemen, and I well know that the learned counsel concerned for the prosecution

will lend you all the aid of their splendid abilities to assist you to reconcile the testimony of these two witnesses. But black and white are not more opposite than the testimony of Mr. Van Hook and Mr. Strong. It is impossible to reconcile them. Which then will you believe? Mr. Van Hook, who was called as a witness, whose attention was particularly directed to what passed in consequence of what had been said to him by Doctor Marshall before they went to Mr. Strong's, who was a calm, a disinterested spectator of the scene, whose character stands as high as that of any other young man, or Mr. Strong, who probably was agitated, who is a party, who appears even before you angry and revengeful, and of whose character I shall say nothing.

On being pressed to say what were the words in which the challenge was conveyed, he said Dr. Marshall asked him to meet Mr. Renshaw. At another time in answer to the same question he said Dr. Marshall asked him to fight Mr. Renshaw.

Dr. Marshall did not directly challenge me in the second interview, says Mr. Strong, it was only from his referring to what had passed at the first interview that I could gather from him what he said in the second that he meant to give me challenge. I cannot, gentlemen, prevail on myself to entertain any fears for the fate of my client. Still, however, I feel that I should not discharge my duty were I not to fulfill the promise I made at the opening of this cause to shew you that Mr. Strong's credit is impeached by the circumstances under which he has placed himself as a witness before you.

In performing this part of the task assigned me, I cannot forget that Mr. Strong is a member of the same profession with myself, and I must therefore feel a reluctance in entering upon it, which I should not do in every other case. But, gentlemen, men do not change their natures by becoming lawyers, and it is my duty to treat Mr. Strong as I would any other man under the same circumstances.

Though Doctor Marshall has been rejected as a witness in this case, on the ground of his having an interest in the event, yet it is manifest that Mr. Strong takes a much deeper interest in the conviction of the defendant than Dr. Marshall

can possibly have in his acquittal. Have you not perceived in the course of Mr. Strong's examination how deeply he considers his character and reputation involved in the verdict you shall pronounce? He has not been able to conceal, even for the short time that he was before you as a witness, his animosity towards the defendant, nor that spirit of revenge which has stimulated him to institute these prosecutions, and which he impatiently expects will be gratified in the condemnation of my client. But Mr. Strong has even a pecuniary interest in this trial. How does it happen that this cause is not as all others have been during this session, left to the management of the official prosecutor? Why has it been thought necessary to enlist against the defendant the splendid talents of the gentleman who now appears as the associate of the Attorney General? Do you believe that this is a cause in which that gentleman would volunteer his services? Believe me, there is nothing in the conduct of the prosecutor, which accords with his feelings, or which can excite his sympathies. He would not exert his abilities in a case like this without extraordinary compensation; and who is to give it to him? Not the public, we know. The purse of Mr. Strong, gentlemen, has been opened. He has paid money to purchase the conviction of the defendant. Then let me ask—

THE COURT: Mr. Colden, these remarks are too foreign to the issue and the evidence.

Mr. Colden: I humbly presume, may it please the Court, that when a witness, the most material we would have had, has been rejected on technical objections, it is proper to remark on the uncommon interest which the only witness for the prosecution has made it appear he has taken, by engaging at his own expense the first talents at the bar.

THE COURT: I think it not right to impute blame to the prosecution on that account. Perhaps it might be laudable to call in aid. It is not however necessary for the Court to pronounce an opinion on that point.

Mr. Colden: Then, gentlemen, I shall proceed to shew you that Mr. Strong has avowed sentiments inconsistent with candour and truth, and has thus impeached his own credit. This obliges me to direct your attention once more to his

famous apology. It is not necessary that I should read to you the protest of Captain Petty, or Mr. Strong's remarks upon it, which were published under the signature of 'A Citizen.' They excited so much the interest and feeling of the public, that no doubt you have read them. They have probably been printed in every newspaper on the continent, and perhaps there is not a man in the United States who can read, on whose mind they have not made a deep impression. You must well recollect, gentlemen, what indignation they excited; that they accused Mr. Renshaw of the most wanton abuse of the power which the government put in his hands; that they charged him with having exercised the most cruel tyranny, and with having in the most unfeeling and inhuman manner ill-treated a peaceable unoffending fellow citizen. Who, believing these charges, could say he had a personal respect for Mr. Renshaw? or what will you think of the veracity of that man, who while he entertained a conviction that Mr. Renshaw was guilty, should, through base fear, or from any other motive, be induced to give a certificate under his own hand, that he respected Mr. Renshaw?

Yet look at this publication of Mr. Strong's. He avows his belief of the charges, and at the same moment says that he has not the least personal disrespect for Mr. Renshaw. Or if, on the other hand, Mr. Strong, when he published the protest and his remarks, did really respect Mr. Renshaw, then he could not have believed the charges in the protest; and what wickedness, what baseness was there in that case in making the publication of the piece signed 'A Citizen'?

I read, gentlemen, with infinite indignation, that abominable confession of Mr. Strong's, contained in this same piece, "that he made these charges against Mr. Renshaw from political motives, and in order to bring the government into disrepute." Is it possible that a man can have the audacity to avow such a want of principle? To avow that he made a charge against a young officer, calculated to ruin him in his profession, to disgrace him with his companions, and to render him odious to his countrymen, with the sole design of traducing the administration! We want no witnesses after this,

gentlemen, to the character of Mr. Strong. This is as conclusive against him as the evidence of thousands could be. It is a certificate under his own hand that he is undeserving of credit.

I am desirous, gentlemen, that you should regard the conduct and testimony of Mr. Strong with all the charity possible. There is an irreconcilable contradiction between him and Mr. Van Hook; and I know that you must believe the latter. But yet I will admit, as Dr. Marshall does, that Mr. Strong may be an honourable man, and I account for his **strange** and irreconcilable conduct and testimony, by supposing that he was, when he wrote the remarks which he published under the signature of 'A Citizen,' and has been ever since, and was particularly at the time he met Dr. Marshall, under some mental derangement. Could any lawyer, or even any layman, in his senses, have composed such a piece as this apology of his?—the whole of which I have read to you, and made some observations on its absurdities, for the sake of making this remark. It seems to me to bear strong evidence of its having been written by a man who had not the right use of his senses. We know, gentlemen, that fear sometimes strangely disorders the human intellect. There is no fact better authenticated I believe, than that, during our revolutionary war, a British regiment to the southward, which was in a situation momentarily to expect an attack, mistook in the night a field of Indian corn for its enemy, and did not discover the mistake till they had exhausted a considerable portion of their ammunition on the corn-stalks, which appeared in their fright to be the moving bayonets of their enemies. Possibly fear had a like effect on the nerves of Mr. Strong; he knew the character of Mr. Renshaw; his fame had reached across the Atlantic; he knew he was one of those heroes who, with Decatur, had won immortal glory before the walls of Tripoli. He knew what would be the consequence of injuring such a man, and from the moment he received the first note from Mr. Renshaw, his imagination was disturbed with thoughts of blood and deadly contests: for he had dreamed of "moving accidents and hair-breadth escapes."

The moment Dr. Marshall stood before him, all his senses took the alarm; he smelt gunpowder in the very breath of the Doctor, and heard the report of a pistol in every word. According to his own story, among the first things he said to Dr. Marshall, was, "I won't fight—if you are for fighting, I am not your man—you need not challenge me, I am no fighter." This shows what was the perturbed state of the gentleman's nerves at this time, and we ought to have the charity to suppose that Mr. Strong's apprehensions made so strong an impression on his mind, that what he expected and dreaded would happen, he has thought actually occurred; and under these false impressions, heightened by disgrace, mortification and revenge, he comes here, and relates to you as facts, things which never had existence but in his own disordered fancy.

I am convinced that the counsel opposed to us, will not rely much on the testimony of Mr. Strong. It is so irreconcilable and inconsistent, as even to defy their ingenuity. Their great effect will be to support the charge by the printed documents. But I do not believe that you can be prevailed upon to put a construction on them so different from their natural import, and so entirely foreign to the intent with which they were written. The statute on which these indictments are founded, is a salutary law, and ought, on all occasions where it applies, to be enforced. Were I a juror, I never would overlook an infringement of it. But in our zeal to punish offenders against this law, do not let us confound the innocent with the guilty. In this, as in every other criminal case, you must acquit, unless there is full proof of the defendant's guilt. Where there are doubts, your verdict must ever be, as I trust it will be in this instance, not guilty.

Mr. Hoffman: Let me not be thought on this, or on any occasion, the advocate of the duellist. Let me not be considered the vindicator of a practice, which in my judgment I condemn—in my heart I abhor: a practice, which has repeatedly outraged society, and, in one melancholy instance, has thrown the gloom of sorrow and mourning over our city, and wrung the heart of every friend to his country. No, gentlemen, I

consider it a flagrant vice, that should be publicly discountenanced, and, as far as human laws can prevail, totally abolished. But let not our abhorrence of the crime, nor our eagerness to correct, betray us into an error of misapplied severity: let the arm of justice be properly directed, lest the innocent be sacrificed as an example to the guilty.

Some months since, Mr. Renshaw was accused, in one of our most respectable public prints, of abuses in the discharge of his official duties, which, if true, would have disgraced him as a gentleman, dishonoured him as an officer, and degraded him as a man; which would have struck at the very root of his hopes and fortunes, by proving him unworthy of remaining in the service of his country. The resentment of the public was excited against him—that public whose soldier he was, and on whose good opinion alone depends the fame, for which the soldier struggles. Commodore Rodgers, with a laudable anxiety, not confined I trust to officers of his high station, felt for the honour of the profession, thus assailed through one of its members. A board of inquiry was instituted—the conduct of Mr. Renshaw was rigorously examined, and he was honourably acquitted. What next was to be done? He had fully cleared himself in the opinion of his superiors; he was restored to the fellowship and friendship of his brother officers; but there was yet one cause of anxiety preying upon his feelings—the charges against him had been reiterated and commented upon in the public prints—their falsehood should be made equally notorious.

He calls on the printer to retract what he had published—the latter, with a just sense of his duty, refers him to Mr. Strong as the author. He is written to, but he gives no answer. Mr. Renshaw then engages his friend, Dr. Marshall, to call on Mr. Strong for that honourable satisfaction which a gentleman, so deeply injured, had a right to expect, and no gentleman, so unjustly injuring, ought for a moment to have withheld. I repeat the words deliberately—he *demand*ed an *honourable satisfaction*.

(Mr. Hoffman reviewed the evidence of Mr. Strong and Mr. Van Hook.)

Gentlemen, I cheerfully consign my client to your protection and to that verdict which you are about to pronounce. For his fate I have but little apprehension as I am satisfied you cannot convict him until you have brought yourselves to believe that Mr. Strong is a cool, unprejudiced witness and that Mr. Van Hook has wantonly testified to falsehoods. They intend to urge a conviction on the indictment charging the defendant with not being a citizen of this state. The punishment on this indictment, in case of conviction, is confinement in the state prison for a period not exceeding seven years—though I do not feel any apprehension that you can bring him in guilty upon either indictment, yet, as I cannot be positive in what light you may regard the subject, I will briefly add a few words. He is a citizen of New York, because this state is his present domicile. It is true he was born in Pennsylvania, then he is a citizen of the United States, and within the meaning and intent of the dwelling act, a citizen of that state where, at the time of the offence charged, he had his domicile or residence. I was born in the state of New Jersey, yet am I not to be esteemed a citizen of this state, wherein I reside, and where I follow my profession and gain my livelihood? But I will not detain you, gentlemen, by argument on this point. It is a question of law and I readily and cheerfully submit it to the charge of the court. I could hardly, however, have imagined that the resentment of the prosecutor would have carried him so far as to seek to cast the defendant into an ignominious prison, and overwhelm him with personal suffering and irretrievable ruin.

Mr. Emmet: Gentlemen—Mr. Renshaw is a military man, and if he has any prejudices they are probably of a military cast. Doubtless he feels his honour his best possession, and therefore guards it with, perhaps, an over-scrupulous attention. He is young, and will it be thought improbable that a young officer in the navy, deeming himself injured, should send a challenge? Or should the statement on oath of such a fact be made the ground to attack the credit and character of a witness? Mark further the course of the transaction. He sends a letter inclosing the proceedings of the Court of

Inquiry. He sends another and another letter, not merely alluding to an apology, as is pretended on the other side, but which has this emphatic sentence, "To this gentleman (Dr. Marshall) I have *fully* committed my sentiments in regard to the existing subject of controversy." Why this word *fully* in italics, if he wanted simply an apology? Why underscore the word fully if something more emphatical was not intended than the words in ordinary acceptation would convey? "And I have given him," he adds, "ample authority to act in such manner as he thinks most conducive to my honour and feelings." If he only wanted an answer to the letter which had been disregarded, would he have expressed himself in such terms? Or what need would there have been of such ample authority to act, "as most conducive to his feelings and his honour?" Even if all he wanted was an apology, he would not have made Dr. Marshall the judge of its sufficiency. He would have said, bring me back his answer and I will judge of it for myself. Where is it that a man commits his honour, his feelings, and his reputation, to his friend? It is where that friend is empowered to give a challenge, and there remains only one point to adjust. What was that which was to conduce to his honour and feelings, and in which Dr. Marshall was to act, if he had no other commission than to be the bearer of his letter? What does an officer mean when he gives his full authority—these plenary powers to another to act in everything as he thinks most conducive to his honour and feelings? You cannot shut your eyes to the meaning of this letter. Commodore Rodgers, indeed, says he read it before it was sent, and did not understand it as giving a challenge. I have not the honour of knowing Commodore Rodgers, but if he received from any gentleman with whom he had a difference, a similar message, I stake my life that he would understand it. A military man acting for another, and that other young, and under his command, and perhaps under his protection, may be so far blinded by affection and anxiety for his honour, as not very accurately or even rigourously to see whether he does not err on the side of promptness and courage; but if that letter was addressed to Commodore Rodgers

himself, by any person of Lieut. Renshaw's profession, and delivered by a friend, would not he conceive that that friend was authorized to deliver him *a message*, and settle every point and punctilio relating to a duel? Whatever understanding he may have of it now, he would understand it differently from what he has said, if his own feelings were concerned.

Mr. Strong, the only witness of the proceedings of the friend charged with these powers, has deposed in so many words, that he did emphatically and explicitly convey a challenge over and over again; but you are asked, if this was the case, why was an apology required in the second interview, and why did not Mr. Van Hook also understand what passed in the second conversation to be a challenge? On the other hand, I ask you, gentlemen, if there was no intention of delivering one, would not an expression such as Mr. Van Hook has sworn fell from Mr. Strong, that he was no fighting man, and that he was a father of a family, have called for this explanation from him, "Sir, you misconceive the object of my visit; I am not come to give a challenge; and if you think so, you have mistaken me." And indeed it is beyond a doubt that one was given, unless you intend to fix upon Lieutenant Renshaw the foulest imputation of falsehood and vain boasting in his letter that has been read to you. Would not an officer of the navy scorn to boast of having given a challenge when he had given none; and to publish a man as a coward for not accepting what never had been offered? But it is asked, if he did do so in the first interview, why should the matter proceed further in the way of explanation? Why? Because Mr. Strong did wish for a reconciliation. He was determined not to fight; but he wished to satisfy himself and Mr. Renshaw as to the publication, and to afford every honourable means of satisfying the latter, short of fighting. In the meantime he says, I did write something, but I have not seen it in print—I therefore cannot with discretion admit it to be mine till I have first looked at it. If it be the same paper that I wrote, I will admit it. This was the basis of the negotiation, and therefore the matter was postponed.

Besides, its being clearly deposed that Dr. Marshall did deliver a challenge, Mr. Strong has told you also, that on the latter day Dr. Marshall did not speak as precisely as on the former, but more by reference to what had already passed. In that you have a complete clue to the testimony on the other side. It seems that Dr. Marshall had been advised by Commodore Rodgers to be very cautious what terms he used; and Mr. Van Hook had himself cautioned him not to speak so plain as to let what he said be construed into a challenge in law—from this the necessity of referring to the message already conveyed. And to that gentleman, who was not present at the previous conversation, it is possible that as what passed before was without his knowledge, so every reference to it might not have been noticed, nor so clearly understood as it was by Mr. Strong, to whom alone it was addressed.

There is however an attempt to set the two witnesses against each other, and to persuade you, gentlemen, that if you believe the one you cannot believe the other. I should be extremely sorry to acknowledge that conclusion; because if you cannot believe both Mr. Strong and Mr. Van Hook, you cannot believe both Mr. Van Hook and Lieutenant Renshaw; the latter of whom has published precisely what Mr. Strong has sworn to, and because in my soul I am convinced that they both deposed with truth, to the best of their recollection and belief. In fact, I never saw an attempt to put two witnesses in confrontation of each other with less ground. The principal contradiction is, as to what took place when they were passing each other in the street, and a very slight one indeed it is. Mr. Strong said, "Your client is chuck full of fight;" and Mr. Van Hook replied, "Has he challenged you?" Mr. Van Hook adds, that Mr. Strong, who was at that moment passing on his way, answered in the negative; Mr. Strong says, on the contrary, that he has no recollection of that answer, but admits that he parried the question. This is not a contradiction to invalidate the testimony of either. It is used, however, as an argument, that if Mr. Van Hook was correct in his testimony, no challenge was given. I admit no such conclusion. Mr. Strong might well have answered so, from haste,

inattention, or from not distinctly hearing. He was in a hurry, and spoke without stopping to consider.

But grant that it were otherwise, and that he did understand and pay attention to the question, yet a man who is challenged, and is determined to refuse the invitation, may have a certain kind of false pride to restrain him from publishing what, however right, might produce an ill-natured sneer from those (I fear too numerous) who think it more honourable in such cases to violate the laws of their country than to observe them. Therefore Mr. Strong might not have thought it his business to sound through all the corners of the city a thing that would be turned against him by his enemies; and which, it would be sneeringly said, he had divulged for the purpose of being bound over.

This circumstance has been used for two purposes: One to shew Mr. Strong's bad recollection; the other to impeach his veracity. As a proof of his bad recollection, the observations I have made shew it can have no weight. You have no reason to doubt his veracity, unless you are persuaded contrary to Lieutenant Renshaw's publication, that he never did receive a challenge. His answer to Mr. Van Hook would not be enough to impeach his veracity, however deliberately uttered, for he was not then upon his oath; and there are few men that would not have answered the same way, considering how many there are, who although they dislike fighting, would not like to have it published that they had been challenged, and declined it. Is his not choosing at that moment to avow it, evidence then that he had not received a challenge? I think you cannot say it is.

The next ground of discredit is, that Mr. Van Hook cannot recollect, in the conversation at which he was present, any expressions that amounted to a challenge. To that I answer, that Mr. Van Hook was not present at the first interview; and whatever his opinion on the conversation might be, he has testified to expressions that will enable you to form yours. What is the meaning I ask you of this expression, which he admits he did hear from Mr. Strong—"I am a father!" Is there any other phrase so descriptive of the feelings of a man

who means to say, I will not risk my life? He could not mean to say, I am a father, and therefore I will make no apology. Would an apology have brought desolation on his house? Would it have made his wife a widow and his children fatherless? Whence then the allusion to those ties that hold us by our heart-strings? Because going to the field of battle, and leaving an unfortunate family, were the ideas that would first suggest themselves in combination to a father; and these words were the true language of a parent of a numerous offspring, that was challenged to put his existence at hazard. And when Dr. Marshall replied, "So am I too a father, yet I would scorn to take advantage of that circumstance to screen me if I had offended any gentleman," what did that mean? That appeal which was made and reciprocated to the dearest connections in life, had no sense—could have no application, but to a single combat; and could not have been uttered but to repel the idea of a duel. The answer, "I am also a father, but would not take shelter under that excuse"—does not that expression, sworn to by Mr. Van Hook himself, show to you, past all doubt, that a challenge, and nothing less, was understood by both the parties. But further, when they were going to part, Dr. Marshall told him, since you will not give honourable reparation you must therefore expect to meet his resentment. The expressions testified to by Mr. Strong are more forcible—he says the words of Dr. Marshall were, "If you will not apologize or *meet* Mr. Renshaw, you must expect his resentment."

If you agree with the other gentleman, the word *meet* means nothing; but in the sense given to it by Mr. Strong, it is consistent with the whole previous transaction, and with the subsequent publications by Mr. Renshaw himself, where so much is said of *courage* and *cowardice*. It is a technical expression, and every man that hears it, knows what is meant by it. Further, every person who is conversant with the language of duelling knows right well what is meant by *honourable reparation*. The counsel for the defendant tell you it would be more honourable to make an apology than to refuse it; but is that what would be considered so by officers such

as their client? Suppose he had employed other terms of usage in duelling, as "Sir, you must give the *satisfaction of a gentleman*;" you might still be told, that meant an apology, and could not mean a challenge; thus every term by which challenges have been conveyed since duelling was first practiced, might be explained away and the law reduced to a dead letter.

There are words, however, technically appropriated to certain purposes, and which can only be judged and received according to the habitual acceptance amongst those that use them. Such are the words in question. The delicacy, refinement, and urbanity of those who practice duelling; the romantic etiquette of giving and receiving challenges, never would admit of the word sword or pistol. The finest terms, and the nicest and most polished phrases, are uniformly selected to express the most resolute defiance.

Gentlemen, have you ever heard of posting a coward? How is that done? By publication. And when you post a man as a coward, what does the publication state? That the writer sent him a challenge and he had not the courage to accept it. It would be preposterous to understand that an officer had published a man for want of courage till he had first made proof of his courage by trying it. So in this publication he avows, and therefore as far as relates to you, he proves, that he has done so.

But we are now told that courage consists in making an apology! I ask you, gentlemen, if you think that is the courage, the want of which Mr. Renshaw meant, by this publication, to impute to Mr. Strong? Was it that he had not courage to beg pardon? No. What then does this paper avow under the handwriting of Lieut. Renshaw? That he did authorize Dr. Marshall to make an appeal to his courage as a duellist; for if it alluded to an apology, he would naturally have said, I authorized my friend, Dr. Marshall, to make an appeal to his justice, to his candour, but not to his courage. Why did he bring in so pointedly the word courage? Because the refusal to make an apology was not what he reproached Mr. Strong with, but that he declined to fight.

Now if Mr. Strong was the most discredited witness that ever appeared in court, and though millions of attorneys had deposed against his character, could you still say upon your oaths that he was not challenged, when the very party accused comes forward and publishes, under his own hand, that he repeatedly called upon him and he was such a coward that he always positively refused?

Mr. Strong says that in the second conversation Doctor Marshall only referred to what had passed in the first. Mr. Van Hook says he was not present at the first. Can you then venture on that evidence to say Dr. Marshall never delivered a challenge, when the whole continent of America, wherever this paper has circulated, has already pronounced that he did?

And let me ask you, is Lieutenant Renshaw to have full credit with the duellists of the community, for having sent a message to Mr. Strong, and an acquittal from those who are bound to enforce its laws, because in truth he never did so? Suppose you liberate him by such a verdict, and let us follow him on his return to his companions and brother officers. How will they laugh at such proceedings in a court of justice? Will he not represent his trial to have been a perfect farce? "My publication in the *Advertiser*," he will tell them, "was first read, and I began to think the day was lost—but lawyers are the finest fellows in the world at a dead lift. My counsel got up, and in the very face of my publication, they contended with the utmost gravity of countenance, and as vehemently as if they were in earnest, that I had never sent a challenge—they abused that poor devil Strong like a pick-pocket, so that I almost pitied him, and humbugged the jury; and they, good men, God bless them, returned with a verdict that I had never sent a challenge!"

Gentlemen, I have been very much mortified to find that such a charge as want of credibility upon oath should be made or insinuated against a member of the bar by any of his brethren, in consequence of the petty altercations and squabbles of our business. Mr. Strong may be an unamiable and unaccommodating practitioner—his strictness may have given offence and made him enemies; but will those things justify

his enemies for bringing forward so foul a charge against a gentleman whose veracity on oath was never before impeached, and whose reputation is one of the means of his subsistence. Professional men should be perfectly aware that the character of a professional man is as precious to him as his life; and that to make a charge of this kind is almost tantamount to a charge of murder.

We come now to the last question. The defendant is indicted upon two several indictments. In one it is laid that he is a citizen of the state of New York; in the other that he is not so. The difference is on account of the punishment, and the diversity of the punishment will afford a clue to the interpretation of those words "citizen of the state of New York." If the defendant be convicted as being a citizen of this state, his punishment will be nothing more than the incapacity of holding any office; but that would be no punishment to one who could not hold any office in this state whether or not. Therefore the object of the law was to devise a punishment for him also who, not happening to be an inhabitant of this state, might otherwise commit with impunity the same crime for which the citizen of the state was to be punished by disfranchisement; and this was fine and imprisonment in the state prison made discretionary in the Court according as circumstances might require; but still the power of the Court was limited at the very utmost to five hundred dollars fine and seven years imprisonment. This provision was manifestly intended to deter those to whom the penalty of disfranchisement in this state would have been a jest. It is said by the counsel on the other side, that every citizen of the United States, upon coming into this state, becomes a citizen of it. I think, however, that a citizen of this state, intended by that statute, is a resident, having his domicile in it, and who has qualified himself for voting in some of those cases where a vote can be given for the choice of public officers, or touching the government of the state. It is that only that affords the constitutional distinction; but it never has been held that a resident upon compulsion, or only at the will of the government, and merely accidentally stationed or quartered there,

subject to be ordered away by command of the executive at a moment's warning, without fixture or establishment, should by that circumstance alone acquire a domicile.

THE COURT: Mr. Emmet, how do you ascertain that he is a resident by compulsive orders? He may be under orders and yet a citizen.

Mr. Emmet: If any person be sent upon a mission to a foreign country, as long as he remains there on that mission, no length of residence can give him the right of citizen there. It is even carried so far that he stands as to his children and every other purpose as a citizen of the country from whence he came, and so long as he continues in that situation, never can be one of the country where he resides. Mr. Renshaw's station is the Navy Yard; it is true he boards on land in this city or elsewhere, because he cannot board in any other way. He must board somewhere; he must eat; but no domicile results from that. He has no house, no vote, he pays no taxes.

Suppose a person coming here from any of the neighbouring states on business or pleasure for a week or fortnight, intending to go back, and that in the interval he falls into a quarrel and sends a challenge, what is then the penalty? That he shall not hold any office in a state where he never means to live or hold any. Is that any application of the penalties of the law, according to the intentions of the Legislature? Mr. Renshaw then is in the same situation. Would it be any penalty upon him to hold no office in a state where he never was before and possibly never may be again. To what would such a construction serve but to render the law ridiculous?

THE COURT: A citizen of one state removing into another becomes a citizen of that other state when he removes. Your argument is that he is here compulsorily, or accidentally, but I do not feel how you establish that.

Mr. Emmet: Certainly any citizen of the United States has a power of removing from state to state, and may go to any one he pleases, and there acquire the right of exercising all the functions of a free or native citizen.

THE COURT: The evidence is that he has been here for a year past, and within the limits of the state. The only question is whether his situation here as an officer disabled him from becoming a citizen.

Mr. Emmet: This is a remedial law, and the intention of it is that the party who has not acquired a domicile, paid taxes, or been qualified thereby to vote for public functionaries, and whom disfranchisement cannot affect, because he has no franchise, cannot be termed a citizen, for it is plain that each class of offenders against this law is meant to be punishable; he who has rights, by losing them—he who has none, by imprisonment and fine. The defendant here has no rights to lose, and the other penalty alone can reach him.

It may be said there is inhumanity in pressing this. We answer, that after conviction the court will have a discretionary power which we cannot doubt but that it never will abuse; and by the court that matter may be regulated.

Gentlemen of the jury, you are called upon to enforce a law that has been adopted to remedy an evil, which after many experiments of other laws, has been still found without a remedy. You fathers of families, are you peaceable members of the community, or are you prepared to say to all the world, *We countenance duelling*—we mean to promote it, not to punish it! You must punish challenges, or duels will ensue; and if duels are permitted, deaths will inevitably follow; and were you to acquit the defendant, and that any deaths should hereafter happen which might touch your hearts as parents, kinsmen, or friends, more nearly than my words now can, you will then perhaps regret the verdict you have given, and the encouragement you have shewn to false honour and to the contempt of religion and law. Jurors must repress duels, or punish murders, or parley with their oaths.

You may have heard of Captain Campbell, lately executed in England. He was a father of a numerous family—much interest was made in his favour, and the testimony of the most respectable members of his profession given in his behalf, as a man of worth and good conduct—but it was in vain. He had challenged—he had fought—he was found guilty—the enormity and prevalence of the practice required a striking example—he was torn from his family, and made a sacrifice to the laws he had offended, and the false notions under which he acted. Do you not see then how much mercy there

is in punishing the sender of a challenge, and how much calamity may be avoided by the timely interposition of the law. Think upon all the consequences, if men, grave, sedate, and respectable like you, proclaim to the world, that the law to prevent duelling is to have no operation; and that the man who chooses to set it at naught, may safely count upon impunity.

Experience shews that this crime must somehow be repressed. In England it is only repressed by death. In this country there is a milder remedy, which is applied to it in its first shape. If this milder law cannot be made to answer, more terrible must follow. It would be unmerciful to hesitate, in a case where there is nothing to create a doubt or to distract your judgment. This is such a case; and in this case you are to say whether you will or will not lend your succour to give peace to the community, and to restrain a crime which has already grown by impunity and countenance to a most alarming degree.

THE CHARGE TO THE JURY.

JUDGE YATES: *Gentlemen*—Of the importance of this case you must be well aware. The law under which the charge has been preferred was enacted with the view of repressing an offence baneful to society; and if you find evidence before you sufficient to support the indictment, you will not set an example that would frustrate the intentions of the law. On the other hand the desire of giving effect to a law, however useful to the community of which you are members, ought not to prejudice your minds against the defence of the accused. You will be governed by a temperate and unbiased view of the testimony, and be guided by that alone in the verdict which your conscience and your best judgment tell you you ought to give, whether it be of conviction or acquittal.

The evidence may be divided into two branches: 1st. As it respects a written challenge. 2ndly. As it goes to prove a verbal one.

It is a fact and the Court feels it as a duty to state that communications in writing with a view to meetings of this

kind, may be made in such a manner as not to express directly a challenge, and yet fully to convey the idea. Whether this note, connected with the other writings and parol testimony, warrants the conclusion that a challenge was intended, is for your determination.

Commodore Rodgers appears to have been consulted at a period anterior to the sending of these notes, and to have had a conversation with Dr. Marshall; and his evidence goes to shew that the intention was not to send a positive challenge, or any message that could be so construed; and he recommends that care should be taken in that respect, and that they should consult with a professional man. How far this testimony ought to go to enable you to make up your minds, it is not the province of the Court to say.

As to the parol testimony, it is to this effect: Mr. Strong declares, that in an interview with Dr. Marshall, he did in explicit terms challenge him to fight a duel; that he answered, that he was a father of a family, and that his principles were against duelling. The conduct of Mr. Strong in this instance, instead of being reprobated in society, is, on the contrary, to be commended. Whether he has exactly stated the facts as they passed, or not, is another question upon which you must exercise your judgment; for the jury are to judge exclusively of the credit due to the witnesses.

There is an apparent contradiction between the testimony of Mr. Strong and that of Mr. Van Hook. Mr. Strong testifies, that he understood the message delivered to him by Dr. Marshall to be an explicit challenge to fight; but he says it was more unequivocally so at the former interview than the latter; and in the latter rather by reference to the former. Mr. Van Hook says, that to his hearing and to his understanding, no such challenge passed. But it should be considered that Mr. Van Hook was not present at the first interview.

There is another circumstance urged to discredit the testimony of the prosecutor—that when Mr. Van Hook met him in the street, and entered into conversation with him, he asked him whether Lieutenant Renshaw had sent him a challenge;

to which Mr. Strong's answer was, no not quite, or not exactly a challenge. How far that answer given as it were in the act of walking along, should weigh to destroy the credibility of Mr. Strong's testimony, is again for you to decide. You have now the sum of the parol testimony, upon which the Court can only observe to you, that when witnesses stand before you in such a situation as that their testimony seems to clash, you must reconcile them if it be possible, rather than confront them, for that is the most charitable course. If, however, you cannot in reason reconcile them, and you are bound to give credit to one to the exclusion of the other, there you must have recourse to all the relative circumstances, and make up your judgment from a discreet and prudent view of them.

The punishment which this defendant might incur in case he was found guilty under one or the other of these indictments, has been used as an argument which should operate upon your minds—but whatever be the punishment ordained by the law, you, gentlemen, are to give a true verdict according to the evidence. Nevertheless, the Court for your satisfaction will give its opinion briefly upon that question. By the constitution of the United States, a citizen of any one becomes a citizen of any other state, by the mere act of removal into it. It appears by the evidence, that Mr. Renshaw has resided for a year occasionally in this city, but constantly within the territory of the state of New York. This, according to the opinion of the Court, makes him a citizen. If he had his family here, he certainly would be a citizen; and the difference of his not having a family, does not seem so essential as to exclude him.

THE VERDICT.

The *jury* withdrew, and after remaining about an hour, returned with a several verdict upon both indictments, of NOT GUILTY.

Mr. Hoffman asked that Dr. Marshall, who was also under indictment for the same misdemeanor, be discharged, it being now proved that there was no challenge sent and consequently there could have been none delivered.

THE COURT granted the motion.

Mr. Strong said that from the conduct of persons in the eye of the

court, it might be dangerous for him to go home to his own house. He therefore prayed that surety might be taken from both the defendants to keep the peace towards him. He made an affidavit that he was in fear of bodily violence and harm.

THE COURT ruled that as the gentlemen had committed no act of violence, he would bind them in their own recognizance without sureties in the sum of \$500, to keep the peace and be of good behavior towards all citizens and particularly towards Joseph Strong, Esq., Attorney at Law, until the next session of the Court.

THE TRIAL OF HENRY G. GREEN FOR THE MURDER OF HIS WIFE, TROY, NEW YORK, 1845.

THE NARRATIVE.

In the autumn of 1844, a company of Temperance performers gave a musical and dramatic entertainment in the Town of Berlin, New York. Among them was a young woman, Mary Ann Wyatt, whose personal appearance and manners won the admiration of audiences at all the places where the company had appeared. One young man, Henry G. Green, was so charmed by the attractions of Miss Wyatt that he at once enlisted in the company in order to be near her. He was a native of Berlin, related to several respectable families there, and about twenty-one years old. He had been a merchant but his store having been burned and he thrown out of business, he was ready to join the traveling company. But it met with bad luck and soon had to disband. He, however, had better success in gaining the affections of Miss Wyatt, for when he returned to Berlin he informed his friends that he was to be married a week from the next Sunday, and invited them to attend his wedding. But the parties were impatient for the consummation of their happiness, and the nuptial ceremony was performed a week earlier than the appointed time.

On the Tuesday following the marriage, which was in February, 1845, the bridegroom and bride returned to Berlin. The next day Green's mother and sister, who were opposed to the hasty marriage and looked upon the bride as unfit to be the wife of their son and brother, visited him, and had a long private interview with him. What was said was never revealed; but it is probable they condemned the marriage and said things derogatory to the character of the bride. Whether the bridegroom's mind was then poisoned by jealousy, dis-

gust, or hate, or the foul purpose sprang up in his heart spontaneously, or from what causes, was never known.

On Thursday the bridal couple went on a sleighing party with a number of friends and on their return, the bride complained that she was not well. The next morning Green went to a local physician and procured a box of pills which he stated were for his own use, and returned to his boarding house. Mrs. Green, having a slight cold, was induced to take six pills at the hands of her husband, although against her better convictions.

At twelve o'clock Green was in the store of one Dennison, among a number of his friends. During a pause in the conversation, he exclaimed, "A rat! no, a mouse!" pointing to the shelf, and stating that a rat had run behind the cinnamon-bag; but no one else noticed a rat or mouse. Green then asked Dennison why he did not put arsenic on the shelf. Some conversation ensued as to the safety of using arsenic, when Green said he did not think it dangerous, and casually inquired how much arsenic they thought it would take to kill a person. Soon after he went to Hall's and prepared a solution for her, remarking that he was going to give her some soda. Shortly after, Green having left the house, Mrs. Hall found Mrs. Green vomiting, in great distress, and apparently at the point of death. Dr. Hall was immediately sent for, and he found the sufferer under the extraordinary symptoms usually attending poisoning by arsenic. He made inquiries as to the medicine administered, left prescriptions, and took his departure, leaving also a strict injunction that no drink should, in any event, be given her. Not long after the doctor left, however, Green presented his wife a tumbler with a white solution in it. Mrs. Streeter, who was present, stated that the doctor had prohibited any drink; but Green said it was cream of tartar, which might be taken. Mrs. Green was finally persuaded to take it, and soon after the vomiting returned with increased violence. Dr. Hall, during the evening, visited his patient several times, and prescribed for her for cholera morbus. The patient was then put under the charge of a Mrs. Whitford, who remained with her until Sunday morning.

Up to this time there was not the least suspicion entertained of the patient having been poisoned, except with Dr. Hall, who mentioned his suspicions to his wife on his return from his first visit, which had, however, been quieted by the answers he had received to his inquiries. During Sunday the patient remained in charge of Mrs. Whitford, who had administered the prescriptions left by the doctor. During the night Mrs. Whitford went below, leaving the patient in charge of her husband. When she returned she found Green in a cot, and the patient informed her that her husband gave her a powder. She exclaimed that the doctor had prohibited powders! The patient said that Henry had given it to her. Mrs. Whitford looked upon the table, and found all the powders which had been left by the doctor untouched. Her suspicions being aroused, she watched the motions of Green, and soon after saw him offer his wife some coffee, which he had been some time in preparing. The patient tasted, but remarked that it did not taste as the coffee did when Mrs. Whitford made it, and insisted on having it from the pitcher, as usual.

Early in the morning Green left the house on business, when Mrs. Whitford examined closely some chicken broth on the table, and discovered arsenic remaining in the spoon; and subsequently a substance was found on the top of the soup, which was dried and preserved, and, when analyzed, was also found to be adulterated arsenic. For four or five times, at least, a substance was found in drinks and medicines, administered to his wife by Green, which resembled arsenic, but specimens of some of them were not preserved or saved. This husband of a week's standing, during the whole of his wife's illness never once inquired after the patient's situation or prospects, or the character of the disease.

A brother of the deceased on Saturday night inquired as to the condition of his sister, when Green informed him she was doing better—the disease had taken a favorable turn, and he need not give himself any uneasiness as to her recovery. But at four o'clock on Sunday the brother inquired of the attending physician as to his sister's prospects, and learned that she must soon die. He immediately visited his

sister, and informed her that she must soon expire. She called her husband and asked him if she had ever deceived him in any respect, and he replied, "No;" if she had ever said or done anything to injure his feelings, and he made the same answer. She then called Dr. Hall to her bedside and informed him that she knew she was about to die, and told him that everything her husband had administered to her since she was taken sick had distressed her; once, when she asked him for some wine and water, he poured out the liquor, and taking out of his pocket a paper, poured a white powder into the wine. Mr. Streeter was called in and the same facts were communicated to him also. She was compelled to suspend her narrative until she rested, but became worse, and never was able afterwards to tell the remainder of her story. Her malady increased constantly until 10 a. m., on Monday, when she died.

A post-mortem examination showed conclusively that she had been poisoned, and a chemical analysis of the food and drink, which had been preserved when suspicions were aroused, revealed the presence of arsenic. An investigation also led to the belief that the jar of arsenic in the store of Dennison and Streeter had been taken down from the shelf, and some of its contents taken out on the Sunday afternoon before Mrs. Green died, and previous to that time.

The fact of poison being thus clearly established, there was little doubt that it was administered by the husband of the unfortunate victim. He was accordingly arrested, indicted, and brought to trial for murder.

The witnesses, giving detailed accounts of the transactions which came within their observation respectively, established certain facts beyond a doubt, and the story thus made up, pretty clearly proved the guilt of the accused. Against the strongly linked facts proved by the Prosecution, the defense was weak, consisting mainly of the evidence of his friends and acquaintances as to his good character and reputation, before the date of the murder. The jury, after listening a week to the testimony and the speeches of the lawyers, returned a verdict of guilty and Green was hanged.

THE TRIAL.¹

*In the Court of Oyer and Terminer of Rensselaer County,
Troy, New York, 1845.*

HON. AMASA J. PARKER,² Judge.³

July 7.

The prisoner having been previously indicted for the murder of his wife, Mary Ann Wyatt Green, by poisoning, in the town of Berlin in February, 1845, and having pleaded not guilty, his trial began today. The following jurors were selected and sworn: Daniel A. Cornell, William Austin, William Kittle, Richard Gardner, Bernard H. Lord, Matthias Overocker, Adam Brust, Richard Valentine, John E. Ryan, John Franklin, William S. Clapp, Leiah Budd.

John Van Buren,⁴ Attorney General, and Martin I. Townsend,⁵ for the People. Joshua A. Spencer,⁶ Job Pierson,⁷ Gardner A. Stowe⁸ and Robert A. Lotteridge,⁹ for the Prisoner.

¹ *Bibliography.** "Trial of Henry G. Green for the Murder of His Wife. Containing the District Attorney's opening, the testimony complete, Judge Parker's Charge in full, the verdict and sentence, the letter of his mother to Green, a poem suggested by the occasion. Troy. Printed for the Publisher. 1845. On the cover of this pamphlet is a wood cut of the prisoner seated in the dock, drawn by F. A. Lydston of Boston, now staying in this city."

*"The Confession of Henry G. Green, as written by himself in a letter to a friend . . . to which is added his Trial and Sentence and the letter of his mother. . . Albany. Printed for the Publisher. 1845."

² PARKER, AMASA JUNIUS (1807-1890). Born Sharon, Conn. Representative N. Y. State Assembly, 1833; Regent State University, 1835; Representative in Congress, 1837; Circuit Judge and Vice Chancellor 1844 and afterward Judge of the Supreme Court of New York, United States District Attorney, 1859.

³ With him also sat County Judges Davis, Bull and Waite.

⁴ See: Trial of Freeman, 16 Am. St. Tr., p. 323.

⁵ See: 11 Am. St. Tr. 534.

⁶ See: 7 Am. St. Tr. 66.

⁷ See: 11 Am. St. Tr. 534.

⁸ STOWE, GARDNER A. Atty. Gen. N. Y., 1853; Dist. Atty., Troy, 1851-1853.

⁹ LOTTERIDGE, ROBERT A. Dist. Atty. 1847-1853, 1856-1859, 1865-1868.

The prisoner appears not more than 21 years old. He is of prepossessing appearance, appears to be in good health but looks careworn. He is dressed in a black suit and has a weed in his hat.

July 8.

Mr. Townsend: The crime for which the prisoner is arraigned is the murder of his wife in the town of Berlin in this county in February last. (He told the story of the crime as related in the Narrative, ante p. 707.)

He then proposed to read to the jury a letter found on the prisoner after he was arrested, dated Feb. 20, and written to him by his mother.

Mr. Pierson objected.

JUDGE PARKER, after examining the paper, said that that the Prosecuting Attorney had better simply, at this stage, allude to its contents.

Mr. Townsend then said to the jury that the letter would in part show a motive for the prisoner's act. It went to prove that his mother had probably so prejudiced him against his wife as to lead him to take her life.¹⁰

¹⁰ This letter which the Court subsequently refused to allow to be read in evidence was as follows:

Troy, February 20th, 1845.

Dear Son: It is with the greatest anxiety that I write to you at this time. I feel to mourn with you at this time, if weeping would do any good, but my head had been so hot that I can't shed a tear today. I am almost distracted that they will prove you are guilty. If that should be the case I am undone and so are you and all the rest of the family. Henry, tell me, are you innocent? And don't deceive me. Henry, I have been sorry that I have told you the reports that I heard and I could weep night and day. I did wrong in telling them to you at all, as I did not think that it would make you dislike your wife at all—as you told me you loved her and married her for love. If so, how could you wish to do so very wrong. If you had been deceived in any way, you could have left her in an honorable way. You told me she was a virtuous girl and I have believed you. And I have been sorry that I told you any hearsay reports, as I don't believe them at all. If this should be the cause of anything that has happened I shall weep night and day, as I did not wish to make you unhappy at all. Will you forgive me and will God forgive me? Oh, I ask it in solemn prayer tonight. As the case will soon be decided be careful what you say and do, for your life depends on it. I want to see you very much indeed. Write to me at once and let me know the whole matter. As soon as you get this—without delay—do it. Let no one see this, on no account. I remain your sincere friend and mother, till death we part. Good-bye, till we meet again.

Henry G. Green

Sally Green.

THE WITNESSES FOR THE PEOPLE.

Ferdinand H. Hull: Reside in Berlin. Green spent a few days in my family in February last; his wife Mary Ann died at my house on Monday 18th February last.

Harvey Betts: Was coroner in February last; held an inquest over the body of Mary Ann Green of Berlin; Dr. Christie was present and aided in the examination; a portion of the stomach and intestines were brought away by Dr. Christie; some powders were given me by Mrs. Streeter, said to have been taken from a bowl of soup; Dr. Emerson Hull gave me a powder which he said he had received from Mrs. Whitford; gave these powders to Dr. Christie.

Dr. James Christie: Am a physician; have been constantly engaged in the theory and practice since 1834, also as a practical druggist; have had the powders in my possession except a portion which was used in the laboratory of the Rensselaer Institute; Dr. Robbins, Dr. Backus, Dr. Wright, A. F. Parke, J. H. Cook, Prof. G. H. Cook and myself were present at the analyzation; all noted for their skill in the science.

Prof. Geo. H. Cook: Am professor of chemistry and the natural sciences in Rensselaer Institute; have been engaged in the study of chemistry some 10 or 15 years; conducted the analysis of powders brought to me by Dr. Christie in February last. Those powders were mostly arsenious acid; one of the powders contained some greasy substance; arsenious acid is the common arsenic sold in the form of a

white powder; tried two experiments upon the contents of the stomach that were satisfactory; it contained arsenious acid; obtained between a half and a whole grain of arsenic from the stomach; examined the inner surface of the stomach of deceased—first at Berlin, before coroner's jury and the surgeons; the stomach was collapsed, the external membrane was expanded, and red blotches like indentations.

The death of the woman was caused by arsenic. There can be no doubt upon the subject; an overdose does not destroy life as rapidly as a moderate dose; if an overdose it will be thrown off by premature vomiting and will not remain in the system; after administering arsenic, death usually ensues from two to seven or eight days; there are instances of arsenic producing death within 23 hours.

Dr. John Wright: Am a practicing physician and surgeon in Troy; I assisted with Prof. Cook and Dr. Christie to analyze a stomach last winter said to be Mrs. Green's from Berlin, at the Rensselaer Institute Laboratory. Dr. Christie brought the stomach to the laboratory. The indications of arsenic were sufficient to account for the death of the deceased. The symptoms which ordinarily appear on taking arsenic are a burning sensation, vomiting and a stricture across the chest, sometimes spasmodic action. Four to five grains of arsenic will produce death, but a less quantity is highly dangerous.

July 9.

William H. Rhodes: Reside in Berlin; am a practicing physician and surgeon; sold Green a small box of pills the morning of Friday previous to his wife's death, at my office; said he was unwell and wished for some physic pills; the pills were composed of aloes, soap, gamboge, rhubarb, and jolly, and perhaps a little oil of annis; a dose of four would operate as a cathartic; never have seen them produce vomiting taken in that quantity.

Emerson Hull: Am a practicing physician in Berlin; known Green from his boyhood up; his wife in February last was sick at the house of Ferdinand Hall; was first called to visit her on Saturday 15th February. Mrs. Green was on the bed in the act of vomiting when I came in, complained of great distress at the stomach, a prickly sensation through the extremities and laborious breathing; quick small pulse; mouth very dry and patient thirsty; said she felt as if she was burning up inwardly; it was difficult for her to keep her eyes open; said Henry thought I had better take a little physic and gave me some pills; some time after taking the pills said she was taken with violent pain at the stomach; said she had taken nothing but the pills except a little wine and water, and when she took the wine and water it distressed her very much; gave her an anodyne camphorated pill, for the purpose of quieting the stomach and allay irritation; my impressions in first examining the patient was that she had taken poison by mistake, and after investigating what she had taken, I

don't see how she could have been poisoned by mistake, but yet considered her case like that of poisoning; treated her case as for cholera morbus; the pill I gave her she immediately vomited up; soon after I gave her another; my first prescription was to take warm water enough to rinse her stomach out, but it was not given as her husband remarked that she had already puked herself almost to death and that I had better give her something to stop her puking. Went home, returned about sundown; patient complained of a burning sensation clear through her; after giving a third powder or pill, I remarked to her attendants that they had better give her no drinks in two hours if she could do without them, but if she couldn't do without them for that time she must do as long as she could; didn't give permission for her to take cream of tartar at any time through her illness; on my return found patient about same as when I left, and made three camphorated powders.

Green was present at the time I gave directions as to the medicines to be taken. Next saw deceased Sunday morning; found her very feeble, pulse not as quick as it had been, extremities cold; gave her injections on Sunday of flour water and gum opium, for the purpose of cooling the system—a remedy frequently used in cases of cholera morbus.

During Sunday she was growing worse all the while; she frequently exclaimed, "Oh, dear, I can't live;" her brother came to me Sunday afternoon and asked me what I thought of her case. Told him she couldn't live and would probably die before morn-

ing. He soon after communicated to her my views of her situation in my presence; he said to her: "Mary, the doctor says you can't live." She groaned—said in a low voice: "Must I die and not see my mother?" The brother

came to me and said: "My sister wants to make a communication to you before she dies." I took a chair, sat down by the bedside and told her what David said, and would hear her.

Mr. Pierson objected to the competency of this testimony.

The *Attorney General* thought it admissible the position taken by the counsel for the defence, and so argued, also citing authorities.

Mr. Spencer followed in an argument against the admissibility of the testimony.

THE COURT stated the case to be a very nice one; and decided against receiving the testimony at this time.

Dr. Hull: Did not see her until Monday—an hour after she died. On Sunday heard deceased say to prisoner: "Henry, have I ever deceived you in any way?" He answered, "No." She said: "Have I ever said or done anything that you disliked?" and he answered "No." She then said, "Oh, Henry!" and nothing more. During the sickness and up to the death of deceased, prisoner never asked what condition she was in or the prospect of her dying.

Cross-examined: Didn't allow the use of either of the two powders after the bad effect of first, and nothing else except the soda and drops; think prisoner was present when I told Mrs. Whitford to discontinue the use of the two remaining powders. Had no arsenic in any shape in my saddle-bags at any of my visits.

July 9.

Rowland Thomas: Am a practicing physician in Berlin; was called to attend Mrs. Green Sunday morning about 10 o'clock; considered her recovery then as very doubtful; if the symptoms continued for six hours her death was certain. Saw her Monday be-

tween 8 and 9 o'clock; she was then apparently dying. Dr. Hull administered the medicine. Did not see any medicine left other than the medicine spoken of by Dr. Hull. Was present at the post-mortem examination of deceased. The stomach exhibited an inflammatory appearance, the blood vessels much affected; was of opinion that one of the coats of the stomach was destroyed in the spots where the indentations appeared; arsenic will inflame other portions of the intestines beside the stomach.

Dr. Hull communicated to me on Sunday morning that the girl had been poisoned; she exhibited symptoms of cholera morbus; the effect of poison is the same.

Mary J. Hull: Am the wife of F. H. Hull; wife of Henry G. Green died at my house. On Tuesday previous to her death, Mrs. Green, her brother and husband came to my house; Mrs. Green and husband remained at my house Tuesday night; she spent Wednesday night at the Public House kept by Dennison & Streeter, opposite; she returned the next morning about 9 or 10; on Wednesday after-

noon she complained of being a little unwell; when she returned Thursday morning she said she had taken some peppermint. Friday morning she did not complain of being sick and came to breakfast with my family and ate as usual.

She was sick after dinner on Friday; she came into the kitchen where I was and said she should vomit; Henry had given her some pills and they made her very sick; next saw her in about 15 minutes when I went into the parlor where she was; she had a strange appearance, her eyelids would fall slowly together; said it wasn't in her power to keep her eyes open; saw her about dark again in the parlor—she soon went into the lodging room next to the parlor and vomited two different times; she sat down in the kitchen and drank a cup of tea; did not partake of any food; she hiccupped while drinking the tea. Her husband came to breakfast—she did not. He said his wife was better but would not come down to breakfast. He carried up a cup of tea to her. She appeared sick on Saturday morning; said she had vomited once or more times that morning. On Saturday defendant

came to the kitchen with a tumbler about dinner time, requested me to put some saleratus in that tumbler. There was a white powder in the bottom of the tumbler and some water. After I put the saleratus in, defendant took it up and left the room. She appeared worse; complained of distress in her stomach and cold and numbness in her limbs. Advised Mrs. Green to have a physician; she said wait till Henry comes. Saw Dr. Hull give deceased some medicine; did not take notice what Dr. Hull's prescriptions were; Mrs. Boon was there; Mrs. Samuel Streeter came before the doctor left. I gave her no medicines except some peppermint. Mrs. Whitford spent the night with Mrs. Green. Know that there was some crust coffee prepared for Mrs. Green—prepared it at Mr. Green's request, took it to her room in a pitcher; did not put any flour or white powder into the crust coffee.

Mrs. Whitford brought the pitcher of crust coffee when she came down stairs; there was a white powder scattered in on the crusts; do not know what that powder was; none of it was preserved.

July 10.

JUDGE PARKER announced that the Court have since yesterday examined the authorities, and have determined to admit the testimony (the dying conversation of deceased to Dr. Hull), then deferred.

Mrs. Hull: Heard her speak on the subject of dying during the day on Sunday; she held up her hand and she and I looked at her nails and saw they were settled; she said, "This morning I did not expect to live till now."

Saw Henry offer his wife medicine on Sunday; he brought it to her in a teaspoon; there was some red drops in the spoon and some whitish powder in the bottom of it. Mrs. Mary Brimmer and Mrs. Sophronia Streeter were

also in the room when Henry offered his wife this medicine; he told her it was time to take her medicine; did not hear his wife reply; said I thought he had not prepared the medicine according to Dr. Hull's orders, told him I understood it should be given a teaspoonful of the red drops in water; he replied there was only water in it; told him I understood the doctor to say she should not be disturbed to take anything. One of the other ladies then asked Henry what the medicine was; don't remember what he answered, or whether he said anything more about this medicine at that time; the spoon was then laid across a tumbler with the medicine in it; don't know how long it remained there.

Daniel Wyatt: Am brother of deceased. Mrs. Green was not in a situation that she could get up and walk about the room on Sunday; looked at the phial of Bateman's drops as it set on the table, didn't see any white powders in it, but didn't look at it to see how the stuff looked; did not at any time administer or help administer drops from that phial; didn't see any of these drops poured out with a view to see how they looked in a spoon; the white powders in the bottom of that spoon were plainly visible. Saw prisoner on Sunday evening just after dark brushing something from the skirt pocket of his coat; took something first from his pocket then turned the pocket out and brushed it off; think what he took from his pocket was something he left on the mantel shelf; it was something in a paper; it was a long piece, thought it was candy.

When Mrs. Green told me of her complaint she didn't say she had a bad cold. Don't remember when Green went out on Saturday that he spoke of going for the doctor.

Dr. Emerson Hull: The powder I gave Coroner Betts was given by Mrs. Whitford Sunday.

Called on Dr. Thomas and he and I made a test with part of it, and the remainder I kept in a wallet in my pocket. The test we applied was by a heated shovel, and the test showed it to be arsenic acid; it smelt of garlic.

We made another experiment at Elder Rogers' shop, when Dr. R. Thomas, Elder R., myself and perhaps one or two others were present. Shouldn't suppose any other powder could have been substituted for this, though it might have been.

Joseph D. Rogers: Was present at the experiments at my shop spoken of by Dr. Hull; Dr. Hull presented a paper there containing a white powder; he opened it and looked at it, then looked through a microscope; it had been suggested that there might be poison; was unable to say from the appearance of the powder whether it was arsenic or not.

Mrs. Julia Ann Whitford: Watched with deceased on Saturday night before she died; found in her room Mr. Green and Dr. Hull; Dr. Hull remained not long after I came. He told me to give her some medicine during the night in a phial and some in a tea cup, from only one phial. There were two papers on the table which the doctor said need not be given. Henry was in the room when the doctor gave

directions as to the medicines. There was some crust coffee prepared for Mrs. Green, in a pitcher, which stood on the table. There was some chicken soup brought into the room that night about 11 by Miss McLaughlin. I sprinkled salt and pepper into the soup in the bowl; did not put anything into the pitcher of crust coffee that night. Mrs. Green had vomited occasionally during the night before I went down to tea; the vomiting was violent; she had also been affected with purging. She complained of pain and numbness in her limbs, also of burning heat in her throat, stomach and chest. Green was about the bedside and room until near midnight; he then laid down upon a bed in one corner of the room. Left no one in the room but Green and his wife when I went down to tea; was gone about half an hour. Green was lying on the bed when I went down, and when I returned was lying there yet. Brought his wife a cup of tea, some of which she drank; she said she had been drinking a powder when I came in with the tea; I asked her what powder, she said she didn't know, it was a white powder that Henry gave her; told her it was not time to take any medicine—that the doctor didn't give me any directions to give her powders; went to the table and found the two powders there that the doctor had said need not be given; told her there were the two powders the doctor had left; there was nothing more said.

After I came up and gave Mrs. Green her tea, Green got up and soon after I laid down. While I was lying down Green had

charge of his wife; could see him and her from my bed.

She requested him to give her coffee, and he took it from the table and carried it to her in a tumbler; saw Green busied at the table preparing the coffee; could not see what he was about. He appeared by the noise like stirring the coffee; when he offered the coffee to his wife she enquired of him what he had been putting into it; said she wouldn't drink it and told him to fling it into the fire; she then wished him to bring the pitcher; he told her she couldn't drink out of the pitcher; she said she could. He then went to the table and again returned to the bed. She wished then that I might prepare the medicine for her; I got up but he prepared the medicine for her and it was taken. I laid down again on the same bed; Henry sat by the fire stirring and warming the soup. I saw him mashing white lumps that were on the top of the soup against the side of the bowl—fine white powder that had got into lumps. That morning after Henry left the room I made a search to see what I could find, at the suggestion of Mrs. Green, and found a teaspoon with white powder in it; the spoon was filled half the length of the bowl at the smaller end; the spoon was lying on the table on the forward part; I put that powder into a piece of paper and saved it and gave it to Dr. Hull in the morning when he came; that was the same powder I showed Mrs. F. Hull and which she tasted. Some of the powder stuck to the spoon after I had taken out what I got; the spoon appeared to have been wet

before it was put into the powder. After Green went out again, I saw the coffee in the pitcher and discovered a white powder upon the crusts on the surface of the coffee; have no knowledge as to how the powder came upon those crusts; have no knowledge how the spoon with the white powder in it came upon the table; carried the pitcher down and showed it to Mrs. Hull.

On Sunday a little after 12 o'clock, I took out some of this white substance from the bowl which Mrs. Streeter had left in it. The white stuff which Mrs. Streeter and I took out of the bowl appeared like the same which I saw in it in the morning. Sunday morning heard the patient speak of dying; she said she could not live until the doctor got there. Did not give her any medicines on Monday; gave her no medicines on Sunday other than those which were ordered by Dr. Hull on Saturday night. When Henry carried the coffee in a tumbler to his wife on Saturday night, she said that it tasted like medicine—that it tasted different from that which I had given her. This is the same I spoke of when she asked him what he had put into it. I had no arsenic in my possession or about my clothing when I went to Mr. Hull's.

Cross-examined: Never saw Mrs. Green until Saturday night; reside in Berlin; had known Green from a child; knew before going to Mr. Hull's the patient had been there with a company that performed on the stage. She was a lady of fine personal appearance.

July 11.

Just before Dr. Hull left he

went to the table and showed me what medicine to give. He told me to give a teaspoonful of the drops in the phial once in four hours, and also a teaspoonful from the cup. Dr. Hull put his hand upon the table, saying those powders you needn't give. Heard tell of Green's leaving Berlin with the company of stage performers. Think he was in business in the village as a merchant up to the time when they were said to have come there.

Pamela Ann McLaughlin: Was living in F. H. Hull's family at the time of the death of Green's wife; aided in preparing chicken soup on Saturday evening; carried some to the patient's room in a deep dish; didn't put powder or flour of any sort into the soup, nor into the pitcher of crust coffee on the table; had not at that time possession of any arsenic, nor did I know of there being any in the house; gave patient nothing but some soda from Friday morning till she died.

Rhoda Streeter: In February last lived in Berlin; my husband, Samuel Streeter, kept a public house there. Green and his wife were at our house Wednesday evening previous to her death; passed the night there. He met his mother and sister there on that day, who resided in Troy. Henry had boarded at our house the principal part of the time from the 1st of April. Saw Henry's wife about two o'clock Saturday afternoon. Dr. Hull was there and also Polly Ann Boone and Mrs. Ferdinand Hull. Dr. Hull thought she had better not drink for two hours; she said she should faint away before that time; the doctor then said she

must not drink for one hour and as much longer as she could do without it; Henry was present at the time this direction was given. Henry, in about 15 minutes after this, presented her with some drink in a tumbler more than a third full. It looked white when he was fixing this drink for his wife; told him the doctor said she must not drink; he replied that the doctor did. Mrs. Green drank what was in the tumbler. A short time before Henry prepared the drink, he said, "Mary Ann, the doctor said you might have a little cream of tartar and water if you wanted it." Did not either on Saturday or Sunday have about my clothing or with me any arsenic.

Saturday afternoon Dr. Hull said he thought some chicken soup would be good to settle Mrs. Green's stomach.

Mrs. Polly Ann Boone: Was at the house of Mr. F. Hull the Saturday afternoon before Mrs. Green died; didn't give her any medicine while there; gave her some drink, tea, from a cup, not more than once.

Rhoda Streeter: Have known Henry Green from a child. Am an aunt of his. Was with his wife on the Sunday before her death. Mrs. Sophonia Streeter came with me; found there Mrs. Crandall and Mrs. Brimmer; there was no one else in the room. About 12 o'clock or little past, Mrs. Whitford and I took some powder from a bowl. From the time I came there until we took the powder out, Mrs. Samuel Streeter, Mr. Wyatt, Drs. Thomas and Hull were in the room while I was there, besides those before mentioned. From the time I came there until I

took the powder from the bowl I gave the deceased no medicine. It was a small bowl; think it would hold from half pint to a pint. They told me there was chicken soup in it. Saw a white curd on top of it that looked like a cheese curd in chunks. Some of it stuck tight on side of the bowl, down in the soup a little ways. Took up the bowl and took it out with a spoon—examining this curdy stuff it turned out to be a powder; it appeared that the grease in the soup had adhered to it and stuck it together. When we took it out we put it on a piece of paper, folded it up, put it in my pocket, kept it till Tuesday and then gave it to the coroner.

Cross-examined: First knew his wife when she was sick; saw her on the stage three evenings where I saw her in that village. She was very pretty and interesting looking woman. She came to Berlin the last of December. Henry then kept a store. His company, the patient among the rest, was there only three days. They performed every evening. They then went south. Henry afterwards joined them. He was gone three or four weeks. His store was closed during that time. He returned to the village about one week before he was married.

There had been some unfavorable reports against Henry before this charge, but I did not know that they were true. Before this company of actors came it was said he had his store of goods burned. He got new goods after the fire and put them into another store. The goods burned, I understand, were insured. Heard some suggestions that he

set his store on fire himself, but it was not a current report. It was talked when Henry went off last winter that he had gone off on account of an indictment for disguising himself and stopping the sheriff. Had heard of a difficulty he had with the church for rudeness and unchristian behaviour. They said he drank too much also. Henry was a member of the Baptist Church. By his disguise I mean an Anti-Rent Indian disguise. He was censured by the church because he drank too much. Among the Berlin temperance people, drinking at all is considered too much. The church called him to account and he acknowledged his fault and retained his standing, I heard.

Wm. J. Sheldon: Was at home in Berlin on Saturday previous to death of prisoner's wife. Was that day in Denniston & Street-er's store when Henry was there. Henry spoke and said, "There goes a rat; there goes a rat." I asked where. He spoke then and said it was not a rat but a mouse. I looked around; it was on the north side of the store that he pointed. I said I did not see any.

He said it went behind the cinnamon bag. Daniel E. Denniston said guessed he must be mistaken for he had not seen any since he had a bob-tailed cat in the store. Then Henry asked why he did not put some arsenic up there; told him I thought it would be dangerous as it might get into the stuff and poison someone. Denniston said he thought there would be no danger as there was nothing on the shelf to be eaten, and nothing under it but some crackers.

Henry then asked how much arsenic it would take to kill a person. I told him I had heard folks say you could hold enough on the point of a knife to kill any one.

July 12.

Dr. E. Hull: On Sunday Mr. Wyatt inquired what I thought of her case. Replied that I thought she could not live the night through, and that we had better communicate it to his sister. He said to her, "Mary, the doctor says you can't live." She replied, "Must I die and not see my mother?" After he made this communication she said to Green, "Henry, have I ever deceived you?" Some little time after this, Mrs. Green's brother says to me, "My sister wants to make a communication to you before she dies." I returned to the chamber with the brother, took a chair and sat down by her bed and remarked that I understood she wanted to make a communication to me. She said she did, but don't know whether she said anything about dying then.

David W. Wyatt: Am brother of the deceased. Heard Dr. Hull examined just now—what he stated in reference to my communication to my sister is true. As soon as the doctor retired from the room my sister asked me if the doctors had entirely given her up. I told her they had. She then said there was something that she wished to say to Dr. Hull. I went immediately down to the kitchen and called him, Dr. E. Hull.

Dr. Hull: The deceased said after I sat down by her bed that after taking those pills which Henry gave her on Friday she had been in the most awful dis-

tress, and it seemed sometimes that she could not live. She said, "I had such a burning through me that it seemed sometimes as if I could not live a minute." She says, "Henry has been feeding me with white powders ever since I took those pills—he has put it into my coffee and into my broth, and almost all my drinks. Yesterday I asked him for some drink," or think she said some wine and water. "He got some, turned his back to me, took a paper from his pocket and dusted something into it that was white; he gave it to me. I asked him what it was he put into it, and he says a little flour. I drank it and it distressed me very much." She appeared to be worried a good deal at this time, and I remarked that her communication was of such a nature that I should be glad if she would endeavor to. I then called on Mr. B. Streeter and asked if he would consent to sit by and hear her communication. I could not hear her to understand her when talking to Mr. Streeter, her manner of speaking was in a low whisper, her strength was feeble, very much so; her mind was unimpaired as far as I could judge, remarkably so. Never saw her previously before Saturday afternoon. Thought her to be very intelligent from my intercourse with her from Saturday until she died.

After my first visit to Mrs. Green, my wife asked me what appeared to be the matter with her. I replied that I did not know—that her symptoms appeared to be like those of poison. Did not state to my wife that I thought she had taken poison voluntarily.

I said to her that I should sooner think of her taking it of her own accord than I should of Henry's giving it to her at that time. Don't know any antidote for arsenic; should be glad to find one; don't know anything that will destroy the effects of arsenic after it is taken into the stomach and remained there.

Barzaleel Streeter: Am husband of the elder Mrs. Streeter who was sworn yesterday. The prisoner boarded in my house for the period of a year; might have been five years ago. Witnessed the temperance exhibitions at Berlin at which Henry's wife participated in the fore part of January. They were exhibiting a play called "The Reformed Drunkard." It had a moral object, I judged. The appearance of this young woman as to intelligence was very fine. There were three or four of our citizens, as I was informed, went as far as Hancock with the company when they left Berlin. Saw Mrs. Green Sunday previous before she died; was present in and out from that time until she died. Did not give the deceased any medicines or drinks during the day on Sunday, or in any way interfere with her medicines, drink or food; had not then in my possession arsenic or any powder of any kind.

Mrs. Green on Sunday evening made a communication to me; Dr. Hull proposed to me first to listen to that communication. She first said, "I am dying, I wish to communicate to you what I have seen and heard before I die." She said Henry offered her pills on Friday and she refused to take them. She said, "I did not consider my ill health serious

and thought it not proper to take the pills. He urged them upon me and told me they would make me feel better, and I took them. Such a feeling as those pills made me have I never felt before. I became numb all over. My eyelids drew down and I could not keep them apart. I began to vomit terribly—a terrible feeling at my stomach, the most deathly feeling I had ever experienced. After that Henry brought me a powder, I saw him take something from his vest pocket and put into it. After he offered it to me I asked him what he put in. He said nothing but a little flour; he brought me some drink a spell afterwards, a white substance appeared in it; I asked him what it was, he says a little soda.”

She here became very faint and weak and said she must rest and could not tell me anything more then, but would after resting a spell. She never resumed this communication to me. She observed to me in this conversation that the medicine which Henry gave her had a terrible effect upon her, more so than that which was administered by the others who had dealt medicine to her. Spoke very easily while she had breath; stopped at intervals, panted a while, and then resumed the conversation. Samuel Streeter, of the firm of Dennison & Streeter, is my son. My son, Harvey Streeter, was their clerk. Late on Sunday evening I communicated to my son Samuel that it was suspected there had been poison there. In Mrs. Green's communication to me she spoke of a very bad burning sensation. She said it seemed as if her stomach would burn up. She said

also, “There was a terrible breaking out upon my stomach and it burned violently; it seemed as if I could not avoid scratching my skin off; such a thing never appeared upon my person before.”

Cross-examined: I never knew anything against Henry's character up to the time of this charge; he has been an intimate of my family. I witnessed the performance on the stage; saw Henry there on one occasion. Mrs. Green was handsome, graceful, accomplished—very much so. Only know Henry was gone from the place after the company went away from information. He was gone three or four weeks and his store was locked up. When he came back on Friday before his marriage, he publicly announced his intention to marry Miss Wyatt. He designated a week from the next Sunday as the day of his marriage and invited the guests to his wedding. Understood he was in fact married on Sunday, just one week previous to the time appointed.

Re-examined: I heard it said that he disguised himself and led a band who took a prisoner from the deputy sheriff in the night time. Did hear a report while Henry was gone from Berlin last winter that he was keeping away to avoid being arrested for that offence. There was a talk as there is in many other such cases, that Henry set his own store on fire to get the insurance. I did not believe it. Henry was always a favorite of mine. Never heard of his being dealt with in the church for intoxication. Henry was a clerk in Troy some four or five or six years ago.

Daniel B. Green: Reside in

Berlin; am a magistrate there. Saw Henry on Friday or Saturday previous to his wife's death, at Dennison & Streeter's tavern. He said he had got some arsenic to put in or had put into his store to kill rats and mice and asked me if I thought there would be any danger. I replied that if he put it where nothing but rats and mice got it, it would do no injury. That was all the conversation.

Cross-examined: No person was present but myself and Henry. It was in the bar room that we had the conversation. I first mentioned this conversation on Monday evening after his wife died. Had not mentioned it before because I did not know of any suspicions and it had slipped my mind.

Monday, July 14.

Mary Ann Brimmer: Was at Hull's the Sunday before the death of Green's wife. Assisted in the care of Mrs. Green. Didn't give her any medicines. Heard it stated by Dr. Hull that the Bateman's drops were to be given one spoonful of drops to two of water. Henry was there at the time. The color of Bateman's drops was red. The sweet spirits of nitre were of a yellowish color. About 12 on Sunday saw Henry take a teaspoon to his wife and tell her it was time for her to take her medicine. She spoke and said she didn't want to take it, or couldn't take it. Mrs. Hull then spoke and said it wasn't time. Mrs. Hull then asked Henry what he had put in it, and I think he said nothing but water. She told him he had not fixed it according to the directions. I asked then to take the spoon. I took it and touched

my tongue to it twice. The contents of the spoon tasted rather gritty. The liquid in the spoon tasted like Bateman's drops, the color was red. There was in the bottom of the spoon a white substance like a powder. I handed the spoon to Mrs. Daniel Streeter. She put it across the tumbler. Mrs. Streeter threw the contents of the spoon into the fire, remarking that she would put some more of the same kind in and see if it looked the same. She then poured some more of Bateman's drops in the spoon, but it didn't look the same—there was no powder in the bottom.

Miss Sophronia Streeter: Got to Ferdinand Hull's on Sunday before Mrs. Green's death. Found there Mrs. Brimmer, Mrs. Crandall and the prisoner. Had no arsenic or other powder; did not administer any powder of any kind to Mrs. Green; gave her crust coffee to drink twice. Heard Mrs. Brimmer speak of Green's offering his wife a spoon with something in it. The contents of that spoon looked like Bateman's drops. There was some kind of powder in the bottom. That which was under the drops was of a reddish color. There were some specks of powder around the edge of the spoon that were white. The reason why the spoon was emptied was that Mrs. Brimmer said that Mrs. Hull said that she thought there was something wrong about it.

Mrs. Polly Ann Boon: Was at Dennison & Streeter's on Wednesday previous to patient's death. Was in the room adjoining the parlor occupied by Green and his mother and sister a portion of the time that they were

there. Heard conversation going on there in a common tone of voice; distinguished a few words spoken by an individual in the room. Took the voice to be that of Mrs. Green, Green's mother. As near as I can recollect, think she said, "*She understood what her character was when she was in Troy.*"

Cross-examined: Don't know positively who Green's mother was speaking to. Only saw her in the room; did not see Green there. Felt anxious to hear the conversation at that time. To see Green's mother I looked through a hole that was in the lock of the door—don't know that I put my ear there.

Samuel S. Streeter: Am a member of the firm of Dennison & Streeter; we last winter kept a store and public house. Myself and partner Daniel E. Dennison, and my brother Harvey had the care of that store. There were two keys belonging to the store. Had one of the keys all day on Sunday. Was in the store twice in the afternoon on Sunday; the first time was about 3 o'clock p. m., and the second time as late as 5. The medicines were kept, some in jars, and some in papers (Dist. Atty. exhibited a jar of arsenic). This jar of arsenic was kept on the shelves. When in the store at 3 on Sunday I did notice this jar of arsenic. The last time I was in at 5 o'clock I noticed it, it stood then on the lower shelf which rested on the top of the letter case. There were other medicines standing on this same shelf. Saw the jar as soon as I went there. That was not the place where the arsenic was kept. Do not know of my own knowledge how the arsenic came

to be displaced. When I found it at 5 o'clock on Sunday no suspicions had reached my ear from any quarter. Do not of my own knowledge know whether Green had had the means of going into the store that day; don't recollect selling or disposing of any papers of arsenic from that jar until after this transaction, nor had I known of any of the papers being taken out from the time they were first put in there. My customers sometimes go behind my counters. They go behind the counter where the tobacco is kept but not where the medicine is. The jar was labelled "Arsenic—Poison" at the time, and had always been. Henry Green had the same access to our shelves that other customers had. He was in the habit of being and sitting in the store. Never have seen more than one sale of arsenic on the books.

Daniel E. Dennison: Was a member of the firm of Dennison & Streeter, was in Berlin on the Sunday before the death of Mrs. Green, had possession of one of the keys of the store on that day. Furnished my key to the prisoner, Henry Green, about 4 o'clock, early chore-time. He asked for the key to get some oats for his horse.

Had not known of the jar being removed from its place. The store is kept locked on Sunday except when we are in there. Henry had the key from 3 to 5 minutes when he went in there.

The arsenic was procured of Thompson & Co., Troy, on the 16th December, 1844, done up in a paper, all in one parcel. When I took it home we divided it into smaller parcels, as equal in size as we could get them with-

out weighing; the whole quantity was originally half a pound. We divided it into nine or ten parcels; have no knowledge of any having been sold up to this time. The books show the sale of one paper to Mrs. Boon, in Harvey Streeter's handwriting. We made an examination of the jar to see how many papers there were in it on Monday—found seven in it; think either Samuel or Harvey Streeter aided in the examination. The reason we examined was from the suspicions I heard on Sunday night. Was not in the store again Sunday night. I didn't part with my key after Henry returned it, nor after I heard of the suspicion of poisoning. Harvey usually opened the store and presume he did that morning.

Cross-examined: We had very few calls for arsenic at our store; noticed the jar daily for I was in the habit of looking round the store to see whether things were in their places; didn't notice on Sunday particularly as to the jar.

Jemima Crandall: Saw Henry Green's wife Saturday evening before her death. Did not on Saturday night give Mrs. Green any drink, food or medicine; did not have with me any arsenic or any other powder. Saw the patient on Sunday as many as five times; didn't give her anything on Sunday—had not with me on Sunday any arsenic or any other powder, did not on Saturday or Sunday in any way interfere with her drink, food or medicine except that on Sunday about noon I handed some coffee for her to her brother to give to her, as he stood nearer to her than I did, that was all.

Harvey Streeter: Was clerk

for Dennison & Streeter in February last. Knew where this jar of arsenic stood in the store—did not know of its being taken from its place upon the shelf on Sunday previous to the death of the patient or in the neighborhood of that time; its place was on the shelf over the post office. The middle shelf I think. Was not in the store on Sunday or on Sunday night—had not in my hands the means of entering. There was two keys only that I knew of—had no key; don't remember who opened the store on Monday morning; did not see the papers of arsenic counted on that day; did not take any papers out of the jar on Monday. Recollect of selling one paper out of that jar but no more. That was sold to Mrs. Boon and was the same one charged on the book.

Ferdinand Hull: Green was in my store on Saturday afternoon. He obtained some salts and cream of tartar at two different times. Was in the patient's room on Sunday forenoon before she died. Did not in any way interfere with the medicines or drinks upon the table, nor the bowl which was there on the table; did not at any time carry any powders into the room.

Charles Wheeler: Know prisoner; he was married last winter at my house—eight days before the death. Mary Anne Wyatt was the sister of Mr. Wyatt, the young man now present. She was in his company.

July 15.

Dr. R. Thomas: Don't know of more than one experiment on the shovel at Elder Rogers' shop. Result of the experiment with the shovel was that when first

heated my impression was that I smelt a garlic odor—on second trial with same portion, suppose I heated the shovel more, was not satisfied that I then discovered the smell. The quantity of arsenic taken from the phial was small.

Allen G. Streeter: Am a carpenter; was in Berlin at the time of death of Green's wife. Proposed to him to make a coffin for her, same day she died. He replied, "As long as the people have suspicions on me I shall order nothing and pay for nothing and so that ends it."

Cross-examined: I afterwards made the coffin, by Green's request.

David W. Wyatt: Mrs. Green was my sister; was with her enacting temperance plays in Berlin on the last two nights in December and on New Year's night; continued generally in her company from that time up to her death; our route from that time was to Hancock, Lebanon Springs, New Lebanon, East Nassau, Malden, Talatie, Coxackie, and Kinderhook, which was the last place we played at. Was present at the marriage of Green and my sister; she was 22 years old; returned to Berlin with her and Henry, and continued there till the time of her death. My sister and myself had been engaged near one year enacting these temperance plays; was one of the party who took a ride to Hoosick Corners on Thursday—we all went in one sleigh. Next saw my sister on Friday at 11. On our arrival at Hoosick heard my sister complain of being cold. She desired me to go into the kitchen and get some "composition," and afterwards said, "Guess

I will go myself, perhaps I can do better in the kitchen than you." We had stopped there before, but not to play.

After drinking in the kitchen, heard her say she had had something good and felt better. We got home about 10 o'clock. She then complained of being unwell and wanted me to look at her eyes and see if they did not look swelled; she remarked that she thought she would not throw by her work as she thought she would get over it. She did not at that time speak of having taken medicine. Saturday saw her about 6; she was then on a bed in the room where she finally died; Green was there. Asked her if she was very sick; she said, "pretty sick," but hoped she would be better in the morning. I came again into the hall that night about eight—met Henry coming down stairs, asked him how my sister was getting along. He said she was better and was asleep. Never knew of my sister's having any arsenic in her possession. First learned that my sister was seriously ill on Saturday after Dr. Hull had been there; first saw my sister on Sunday morning about 3 o'clock. Met Dr. Hull, he told me her symptoms were those of poison. He did not allude to any suspicion of any one; caused Dr. Thomas to be consulted.

Did not give anything to my sister on my second or third visits on Sunday. After 1 o'clock the first thing I gave my sister was lemonade—this was prepared on the table in the room where she was; it was composed of lemon juice, sugar and water. Before I gave her any more, the doctor thought had better put

wine in with it, and the next we gave her had wine mixed with it. Gave this to her every little while, Mrs. Streeter and I.

Had suspicions against Green before any were communicated to me about 4 o'clock Sunday afternoon, from medicines I saw him offer. Saw him offer a tumbler half full of some water and something like a teaspoonful of a white substance which he was stirring up in it; he was standing by the table and stirring it when I came in; he started to the bed with it and said, "Come, Mary Ann, it is 4 o'clock and it is time to take your medicine." She said she did not want to take it just then. He replied: "The doctor said you must take it at 4." She then said, "I can't take it, Henry!" I then stepped up to the bed and commenced conversation with her. I asked her what the matter was, if she thought they were giving her too much medicine, and she replied in a low tone, yes. Henry was standing perhaps four feet from her, and I should think he must have heard her. She groaned, turned in the bed, and said, "Yes, too much already," in reply to my question. Never saw the contents of the tumbler afterwards.

The time I gave my sister medicine I gave her Bateman's drops and sweet spirits of nitre. After my sister made communication to Dr. Hull and Mr. B. Streeter, she made communications to me, the first about 12 o'clock Sunday night. The conversation commenced by asking her whether she thought she took much cold. On Friday morning Green gave her six pills. That after she had taken them they caused a great

distress in her stomach, caused her to vomit. She then went on to say that Green had administered to her a powder a number of times. He called it soda and water. She said he had mixed powder with the doctor's medicine, and in almost everything that he had given her. She said she asked him for soup on Sunday towards morning; she thought everything he had given her distressed her and she thought she would take notice how he would prepare it. She saw him put his hand to his pocket on his side, take out a paper, put some of it in the soup and put the paper back into his pocket.

When he came to the bed with it she asked him what he had put in it; he told her he had put a little flour in it; I asked her why she drank it; she said she couldn't believe he meant to poison her, and she drank a part of it. She said after she found how sick it made her, she refused anything from him that he prepared for her. She remarked that she was poisoned to death. At about 3 o'clock she made another statement to Lyman Bennett and his wife, of which I only heard the last. She said, "He has poisoned me to death." I asked who, and she said, "Henry."

Cross-examined: First became acquainted with Green at Lebanon Springs three or four nights after New Year's. Had seen him before in Berlin at a number of places—had seen him at the church in the door. Acted three nights at Berlin. Think sister first became acquainted with him at Lebanon Springs. Green and my sister talked together at New

Lebanon, below the Springs, where he took part with us. He went on the stage and sung with us; think he acted with us five weeks, during which time he went to Berlin and back again. Noticed an intimacy between him and my sister, can't exactly recollect at how early a period, after they fairly got acquainted. We traveled together and all became pretty intimate. They were married in some six days after I heard of their engagement.

It was about 4 p. m. Sunday when I saw him stirring something in a tumbler as I went into the room—her refusal to drink it first excited my suspicion and the appearance of it together; it didn't look to me proper to give a powder in so much water; didn't think the doctor had ever ordered a powder to be given in so much water. When Henry went to her she at first said, "I don't want to take it now Henry," and next, "I can't take it, Henry."

When I asked her how she felt,

she said she felt very bad. Asked her, "Do you think you took cold when you went to Hoosick?" she said, "I think not much. Green gave me six pills on Friday morning. After taking them they caused great distress in my stomach and vomiting; he then gave me what he called soda and water (or soda water) a great many times." Asked her, "Did it look like that I saw him offer you at 4 o'clock?" She replied, "I think it did. On Sunday near morning I asked him for some soup—I thought I'd take notice and see how he prepared it; he took a paper out of his pocket, put something in it, and then put the paper back into his pocket. When he came to the bed with it I asked him what he put in it—he said he put in a little flour." I said to her, "Why did you drink it?" "I did not believe he meant to poison me and I drank part of it. After I found it made me so sick I refused taking anything prepared by him."

July 16.

Mr. Pierson stated that notwithstanding the Court yesterday prohibited the introduction of a letter found on the person of the prisoner as evidence, it had appeared in a morning paper, and thereby the purpose of the Court had been defeated. THE COURT considered the publication as entirely improper, but as the jury were prohibited from access to the papers, it may be hoped that the injurious effect of the publication would not be suffered.

David W. Wyatt: Am not possessed of any property. Have to depend on my constant exertions for my living. My sister had no property that I know of. Before we commenced the enacting these plays my sister had been working in the mills at Lowell. Have

worked some eight days in Berlin since my return in hoeing corn and potatoes. When my sister spoke to me about marrying Green, I told her I heard nothing against him; I gave my consent.

THE WITNESSES FOR THE DEFENSE.

Porter G. Dennison: Have been intimately acquainted with the defendant about six years; have been in his store a great deal. Saw him in Berlin three or four days before he was married—he announced his intention of marrying when he came back—he expressed himself attached to Miss Wyatt—he spoke of her beauty and good disposition, but nothing of her intelligence—he designated as the time of their marriage a week from the next Sunday. Was invited to go on the ride to Hoosick on Wednesday. Besides the bride and the bridegroom, and myself, David Wyatt, Mr. Niles, Alzina Rhodes, Mary Rhodes, her sister, and Alzina Godfrey, composed the party. We left Berlin between 12 and 1 o'clock. We went in a sleigh; heard the patient say she ought not to have gone out that day in consequence of being unwell in the morning. Believe she as well as Green sung on the way back. First heard of Green's wife being seriously ill on Saturday, from her husband; he appeared distressed for his wife's illness—said she was bad—he was crying at the time, said his wife was dying, and wished me to get Dr. Rhodes. Green's character for honesty and integrity I considered to have been very good—as good as most of the young men's.

Alson G. Niles: Have been acquainted with Green for 14 or 15 years. His character and standing in the community up to the time of this charge, I should think as good as most of young men. Think Green informed me of her illness. He appeared to be much affected when he gave me the information.

Samuel Hull: Know Franklin Maxon; saw him in Brimmer's store inquiring for arsenic. Brimmer informed him that he had none but Dennison & Streeter had. He went there and soon came back, saying he had some, then said I wish I had some, and afterwards went over to D. & S.'s and got a paper. Dennison let me have it, noticed that he took it from a glass over the post office, had a whole paper as it was in the jar, half as long as my finger. Paid six-pence for the paper, couldn't say how many papers were left in the jar.

Rufus Allen: Reside in Berlin. Am acquainted with Dennison and Streeter—was often at their store—know Franklin Maxon. Was present some time last season when Maxon purchased a paper of arsenic at that store. Took hold of the jar and looked into it—didn't count the papers but should think there might have been seven or eight.

July 17, 18.

Daniel P. Hull, Winter Green, Thomas Hull, Jr., Jonathan Burdick, Sanford Lott and Lyman Saunders testified that they had known the prisoner for many years and had never heard any thing against his reputation before this charge.

Barzaleel Streeter (recalled): Prisoner had some very hard fits while living with me; don't know what they were called. He lay in a cramped condition for some time and wanted assistance to hold him. This was as much as four years ago; do not know that they have been continued since.

Cross-examined: Didn't notice that the fits had any effect upon his habits after he recovered.

Dr. Rhodes (recalled): I have attended Green in these fits—he would be taken with spasms. They came as near epileptic as anything. After the spasms would leave him, he would have strength enough to get up. Did not think him sensible of his condition at such times.

The *Counsel* on both sides addressed the jury at length.

THE JUDGE'S CHARGE.

JUDGE PARKER: Gentlemen—To all concerned, this case is one of importance; to the prisoner at the bar it is certainly one of vast importance, for his life hangs on the issue. To the public it is of infinitely great importance, because the good order of the community depends on the prompt and faithful administration of justice, and the punishment of crime, where crime is proved to have been committed. It is of no less importance to you, who are acting in the discharge of a duty which you have solemnly engaged to perform faithfully, and according to the evidence. And for the manner in which you discharge that duty, you will be held hereafter to a just accountability to your own consciences and to God.

I repeat, the patience with which you have listened to this long trial, and to the arguments of counsel, satisfy me that you do feel the importance of the considerations I have suggested, and that you will endeavor to do your whole duty. This is a case certainly of most extraordinary character. In examining the cases of capital crimes recorded in the books, there is nothing to be found precisely of this character; nor is there anything like it in the experience of any connected with the courts. A young man just entering on life—scarcely twenty-two years of age—connected with some of the most respectable families in the county—stands indicted not only for the highest crime known to our laws, but for the murder of his wife; and that too, of a wife to whom he had been married but a very few days.

I have spoken of the standing of the prisoner's friends, and much has been said by counsel on both sides on this subject; and appeals have been made to you on both sides, based on this circumstance. The standing of these friends should

have no influence on your opinions, one way or the other. It must matter nothing to you whether the prisoner is a humble and friendless man, or whether worthy and wealthy citizens are standing by him, to secure to him all the favor and all the rights that are to be had in such a case. All persons are to be dealt with equally and justly by you. The public look to this court for a faithful and just administration of the law, and for an honest, upright, pure discharge of the duties devolved upon it. All classes of community, whether of high or low degree, are equally concerned in the faithful administration of the laws. Unless the fountain of justice be pure, those who have acquired wealth by their industry, cannot be protected in the enjoyment of their acquisitions, and the humble citizen can look nowhere but to the protection of the courts against the power and influence of those above him. I am confident you will enter on the discharge of the great duty devolving upon you, by excluding from your minds all considerations, whether urged on one side or the other, connected with the standing of the prisoner or of his friends. They should not influence your verdict in any, the slightest particular.

The proof in this case—and I speak of facts which are not contradicted—shows that, early last winter, the prisoner at the bar became acquainted with the deceased; that a few weeks after they were married; that on Tuesday following the marriage he brought his wife to Berlin, the place of his residence; that on Friday she was taken ill; that on Saturday a physician was called; and that on Monday morning she died. These leading facts are not contradicted—and it becomes therefore unnecessary that I should call your attention more minutely to the testimony in regard to them.

To find the prisoner guilty of the crime charged against him, certain other facts must be established beyond a reasonable doubt. It must be shown not only that the person charged to have been murdered is dead—and the fact is not disputed—but that she came to her death by poison administered with a design to effect her death. And a further, and more important fact must be shown. You must be satisfied

that that was the act of the prisoner at the bar. These stern facts must be established beyond a reasonable doubt, before you can say the prisoner is guilty. When they are so established, you have no alternative but to pronounce your verdict accordingly.

Was Mrs. Green poisoned? And did she die of poison? Perhaps I may properly remark that that fact seems to be now hardly contradicted. The proof is that when Dr. Hull was called in on Saturday, her symptoms were those of poison. He prescribed however for another disease. Her symptoms continued throughout the same. And the proof is that the body was opened after death—the stomach and adjoining parts of the asophagus and duodenum were taken out and brought to this city, examined by chemists and physicians, and properly subjected to the usual tests to ascertain the presence of arsenic. There were found in the stomach and about it, some six grains of arsenic. It is conceded that four and a half grains will produce death; and though no recorded case is found where life has been destroyed by less than that quantity, yet physicians hold that a less quantity will produce death. You have heard the opinions of these physicians, and the comments of counsel thereon. They assign and they could ascertain no other cause for the death of Mrs. Green. There was arsenic enough found in the stomach to have caused her death. And this fact taken in connection with the symptoms, renders it hardly worth while to consider it a controverted point.

If then she came to her death by poison, the next and far the most important question to be settled is, was it administered with design to take her life, and was that the act of the prisoner? Did he commit the murder? Did he designedly administer the arsenic that caused her death? And this fact must be satisfactorily and reasonably established to authorize a conviction.

It is true, as claimed on the part of the prisoner, that the evidence adduced to support this part of the case is circumstantial. If a person witnesses the very act of taking life, and swears he saw it, that would be direct and positive evidence.

But in all cases where no one witnesses the commission of a murder, but where it is inferred from circumstances, it is called circumstantial evidence, and in such case, is it that a jury convict, if they convict at all.

Much has been said of the nature of circumstantial evidence, and of the credit that ought to be given to it. When a witness appears before you, and swears that he saw the fatal blow struck, or the act done which deprives another of life, the only question left is, does he swear to the truth? Does he commit perjury, or is he mistaken in regard to the circumstance named? When evidence is circumstantial, it may be in some cases more satisfactory than positive evidence. As, for instance, when a circumstance is proved by many witnesses—or where similar circumstances, tending to the same point, are proved by different witnesses; or when circumstances are shown beyond all doubt, which lead necessarily to one conclusion, and are irreconcilable with any other, they may be more satisfactory than direct or positive testimony. In both cases, it is possible that injustice may be done. It is the nature of human tribunals; and whether the evidence be positive or circumstantial, in all cases, there is a possibility, a bare possibility, that perjury may be committed. But in all these cases, you are bound to take the evidence as true that is given by the witnesses, whether positive or circumstantial, if there be nothing in the case to shake their credibility, or to authorize you to doubt the statement made—especially when the statements concur to support each other, and where there is no contradiction between them. Because a jury cannot arbitrarily discard testimony, whether positive or circumstantial. In both cases you should scrutinize the evidence, and see whether there is any reason to believe that the witness swears falsely or is mistaken—and when the facts are established beyond all question, you are to see to what inferences they necessarily lead your minds.

In examining the evidence as to the point whether the prisoner is proved to have committed the act charged, it is claimed on the part of the prosecution, and the counsel insist that they have proved that he had arsenic—that he had it

in his possession at the time. It is proved that there was arsenic at Dennison & Streeter's store. It is shown who had possession of the key and who were in there on Sunday, that one of the owners of the store, on going in that afternoon found the jar of arsenic out of its place and the cover partly removed. He tells you that about 4 o'clock that afternoon, the prisoner came to him and got the key to get oats for his horse—that he was gone a few moments and returned with the oats. It is claimed by the prosecution that there is enough in these circumstances to lead your minds to the conclusion that the prisoner (who was the last person in the store before the owner went in at five) must have taken arsenic from the jar. It is claimed also on the part of the prosecution that originally there were nine or ten papers of arsenic in the jar, and that this number was reduced to seven when the investigation by the Coroner was had and that one paper only had been sold—and that this is a circumstance, in connection with the other mentioned, to show that one of the papers was taken by the prisoner. Now doubtless, this is evidence of considerable importance, though by no means controlling. If it be satisfactorily established that he took arsenic from the store on Sunday afternoon, that would not account for the use of it by the prisoner before; and much if not all the evil that was done was by arsenic administered before that time. But it is claimed on the part of the prisoner, that the missing papers were sold previously; and two witnesses have sworn that sometime in the fall or winter they purchased arsenic at this store—each one paper. And the question is, whether the papers purchased were purchased before the nine or ten papers came into the hands of Dennison & Streeter. They tell you they purchased it on the 16th of December last—and it is for you to say from the evidence on both sides, whether the papers sold, were sold before or after the 16th December.

But, as I before said, I by no means regard this as a controlling circumstance in the case; whether the fact be established or not that the prisoner took arsenic on Sunday from this store. For if no other be traced to his possession before Sunday, the arsenic claimed to have been administered on

Saturday, and on Friday in the pills, is not accounted for. There is other evidence that the prisoner had possession of arsenic before Sunday. I allude to the testimony of Mr. Daniel B. Green. On Friday or Saturday before the death of this woman, Mr. Green had a conversation in a bar-room with the prisoner, in which conversation he admitted that he had arsenic. This, certainly, is important evidence in the case. For if you are satisfied that the prisoner had the means of committing the crime charged, it is one step towards the establishing of his guilt.

It is further claimed by the prosecution that the prisoner administered arsenic to the deceased, and there are very many circumstances tending to establish that point. And I do not intend, on the present occasion, to call your attention minutely to this mass of the evidence; because the counsel on both sides have examined it more or less closely and have presented it to you in all its bearings. It is all fresh in your recollections. It is my duty, however, to call attention to the leading points in it, to state issues involved in the trial, and which must have an important influence in bringing your minds to a conclusion—and to submit the case to you under suggestions merely of that character. But to a few of these circumstances it is my duty to advert.

The proof is that Dr. Hull was called in on Saturday. One circumstance occurred at that time which has been the subject of some comment, and that is, that when Dr. Hull recommended warm water to rinse the stomach of the sick woman, the prisoner objected. Now it has been urged on one side that this objection was made from motives of humanity—from a belief that she had vomited enough, and that it should be checked rather than provoked. But it is urged on the other side, and with considerable force, that if the warm water had been administered, as Dr. Hull recommended, the deceased might throw up some of the poison which it is claimed the prisoner had previously given her, and thus not only betray the cause of her illness, but relieve the stomach, and perhaps save her life. You, gentlemen, must pass on this evidence—you must say what inferences are to be drawn from it—and

come to some satisfactory result as to the motive of the prisoner in objecting to the warm water at that time.

Another circumstance urged by the prosecution, is that on Saturday afternoon the prisoner came down stairs with a tumbler two-thirds full of water, and a white powder in it, or rather at the bottom of it. He said it was soda—asked for some salæratuſ to put in it, for his wife. The salæratuſ was put into the tumbler, and he then went into the hall, and was gone long enough to have gone to his wife's sick room, and to have administered it—and then came down to dinner. It is claimed on the part of the prosecution that the white powder in the tumbler, before the salæratuſ was added, was arsenic—that he needed some pretense to cover up or disguise the arsenic, and therefore applied for salæratuſ. Because it is urged, there could be no propriety, and it can scarcely be supposed the prisoner believed there was any, in mixing two alkalis—salæratuſ and soda. You, gentlemen, must judge of this circumstance, and give to it such weight as you think it entitled to.

Again, it is claimed that on the same Saturday in the afternoon—Dr. Hall having forbidden the deceased to take drinks, within an hour at least—the prisoner, within a quarter of an hour of the time when this injunction was given, prepared something white in a tumbler, and gave it to his wife, and she drank it. And it is said the prisoner was present when Dr. Hall prohibited drinks as stated. It is claimed by the prosecution, that this was arsenic, and being administered in a liquid against the doctor's instructions, was proof that the prisoner was not governed by honest motives in doing the act in question. But you, gentlemen, must judge what weight is to be given to this circumstance.

Again, on the part of the prosecution it is claimed that on the same Saturday, at night, or during the night—the time I believe has been fixed at about one o'clock, Mrs. Whitford, who had been watching with the deceased, had been out half an hour, and on her return to the sick room, Mrs. Green, the deceased, said to her that the prisoner, during her absence, had administered to her a powder—and that she knowing that

the doctor had left two powders, but had not directed them to be given, looked upon the table and found both powders still there. And it is urged further, by the prosecution, that this powder, thus administered without direction from the physician, was not one of the powders left by him, and that in no way consistently with the prisoner's innocence can it be shown why he administered it. And it is claimed by the prosecution that this too was arsenic.

In regard to this statement of the deceased, I should say to you that it was not made as her dying declaration. It is not therefore of itself evidence unless said in the hearing of the prisoner. In that case it would be evidence.

Now the proof is that the prisoner was then on a bed in the same room, the situation of which has been described to you; and if you are satisfied from the evidence that he heard what was said on Mrs. Whitford's coming into the room, then it would be evidence. If not, it is barely a statement of the deceased and is not evidence.

It is claimed also by the prosecution that soon after this occurrence, he offered her some crust coffee, which she refused to take—that on the same Saturday night the prisoner sat by the fire stirring some soup in a bowl, and mixing white lumps which appeared on the surface; and doubtless here we have important evidence. It appears some chicken broth had been prepared for her—that it was taken to her room in the evening, and had been administered to the deceased. And the proof is introduced by the prosecution that on the night Mrs. Whitford saw the prisoner by the fire with some of this broth, stirring it with a spoon and mixing what appeared to be white lumps in it, mashing them against the side of the bowl. It is claimed on the part of the prosecution that this was arsenic. If it was, then it partakes much of the character of direct evidence. It is claimed by the prosecution that the soup in the bowl thus stirred must have been administered to the deceased, because in the morning very little was left in the bowl, except a sediment having a white curdled appearance, which was taken out, analyzed and found to be arsenic.

It is also claimed by the prosecution—and this is important evidence—that on this night, after this preparation of the soup, Mrs. Whitford, who was watching with the deceased, during a short absence of the prisoner from the room, at the suggestion of Mrs. Green, searched to see what she could find—that she found a spoon lying on the table, having in it a powder—a white powder—extending half the length of the bowl of the spoon—that she preserved it in a paper, and it is claimed that this same powder, thus preserved, upon analysis, was found to be arsenic. Doubtless this is most important evidence. Because, it is claimed that no one but the prisoner would have brought arsenic there; that all the witnesses called, and all who assisted and attended the deceased, swear they had no arsenic and brought none there. The physicians state that there was nothing of the kind in the medicine they left; and therefore it is urged with force, that the fact that the arsenic was found in the bowl, after the soup was prepared by the prisoner with the white powder—he only, his sick wife and Mrs. Whitford, being in the room, furnishes strong evidence against him that he used it and left it there in the spoon, and that this is strong evidence of his guilt.

On the same night, it is claimed and the prosecution have proved, by Mr. Hull and Mrs. Whitford, that the crust coffee had on it a white powder. This alone would be of much less importance. It is only by taking all the circumstances together that they carry with them the weight as claimed for them by the prosecution. Mrs. Whitford also states that on the same night she saw the prisoner stirring something in a tea cup, and that at the time there was a white powder on it in lumps. These are the principal circumstances that occurred on Saturday afternoon and night.

Some things occurred on Sunday worthy of note. Mrs. Whitford and Mrs. Brimmer swear that on Sunday morning the white curdled substance found in the bottom of the bowl in which the soup was, was taken out and preserved. It was analyzed, and found to be arsenic. And perhaps I should say that on the part of the prisoner, a very minute examination has been gone into, to ascertain if this powder could

have been changed. Here were two different papers of powders taken by two different persons—one from the spoon and the other from the soup bowl—both of which were delivered to the coroner, by him delivered to the chemist, and by him analyzed and found to be arsenic. The attempt has been made on the part of the prisoner to show that it had been changed. It is for you to say whether there is any probability whatever that such a transaction could have happened.

On Sunday at 10 o'clock, or about that time, it is proved by Mrs. Hull, Mrs. Brimmer and Mrs. Streeter that the prisoner offered the deceased some red drops in a teaspoon, and that there was white powder in the spoon. They state that they asked him what medicine it was and he made no reply. That on Sunday afternoon, after the prisoner had been to the store of Dennison & Streeter to get the oats for his horse, Mr. Wyatt, the brother of the deceased, came into the sick room and found the prisoner mixing white powder in a tumbler of water—that he offered it to his wife and she refused to take it—and at Wyatt's special request, the prisoner left him to take charge of Mrs. Green.

There is other evidence also adduced on the part of the prosecution—among other things the dying declaration of the deceased. It is proved by Mr. Wyatt that she stated to him that the prisoner gave her a white powder in some wine on Saturday—that she wanted some wine and water—that he turned his back to her, took from his vest pocket a white powder and put into it—that she asked him what it was he put in, and he said it was flour.

These occurrences are relied on by the prosecution to show that arsenic was administered to the deceased by the prisoner; and it is claimed that here is a train of circumstances all tending to one conclusion: That he continued to administer to her, from time to time, some white powder, not only not authorized by the physician, but against his positive directions, and that in two of these cases the powder was preserved, analyzed and found to be arsenic.

But there is another branch of evidence bearing strongly on this point. I allude to the dying declaration of the de-

ceased. This evidence was not admitted without time for examination and reflection; because, it is evidence of great importance, and should not be resorted to unless clearly admissible, more especially in a case of this moment. In this case it is proved that the deceased was very ill, suffering indeed under great torture. Wyatt, her brother, applied to the physicians, that he might understand the true state of her case. The proof is they told him she could not live—that Wyatt communicated that to his sister, and that after this communication, the deceased, believing she was about to die, requested and had an interview with Dr. Hull, to whom she made the statements that are familiar to you. That subsequently, Barzaleel Streeter was called in, and a similar statement was made by her to him, and afterwards to Mr. Wyatt. These declarations are proved by these three witnesses—and if made under the circumstances claimed, after she was informed and when she believed that she could not live, then they become evidence in the case—because if living, in a case of that character, she could be a witness to testify to the facts to convict him of an attempt to poison. But having died under the effects of poison, the law still permits her to be a witness in this way—by showing her dying declarations made under a deep sense of her situation and when it is to be believed she spoke the truth. Now on the dying declarations, as well as on the other circumstances alluded to, the prosecution rely to satisfy you that she was poisoned by the prisoner at the bar.

Without going minutely into these declarations, they were substantially these: That the prisoner advised her to take pills on Friday—that she took them unwillingly, not believing she was in a situation to require them. That soon after she was seized with these violent symptoms, vomiting, distress, a burning sensation in the stomach. She stated her continued suffering, from that time down to the period when these declarations were made—and further that in all the medicine that Henry (the prisoner) had given her since, there was mingled a white powder—sometimes in wine, again in soup, again in crust coffee, and on the other occasions mentioned.

These are generally her statements, and they are introduced on the part of the prosecution to show that it was the prisoner that administered to her this white substance, and which caused her death. This is competent evidence. If you are satisfied that these declarations were made under a sense that she was about to die, they are entitled to great weight as testimony. And it is for you to give them such weight as you may deem them entitled to, contrasting them with other proof in the case, and seeing if they are sustained by that evidence.

It is further urged by the prosecution that they have proved an evident designed intention throughout on the part of the prisoner to poison his wife. And it is claimed that there could have been no accident or mistake on his part, in this continued administration of poison—that there could have been no accident or mistake on his part in administering it, as is claimed he did in her food, as well as in her drinks, and that there are other circumstances going to show a deliberate, designed motive throughout—and such as exclude all possibility of accident or absence of design on the part of the prisoner.

It is proved that he called on Dr. Roberts on Friday morning to get pills, stated to Dr. R. that he wanted them for himself—and it is claimed that this declaration of the prisoner was a concealment and a falsehood, going to show a dishonest and wrong motive in obtaining the pills. It is claimed also that what took place between Wyatt, the brother of the deceased, and the prisoner in regard to the condition of his sister, on Sunday afternoon, shows also that he was governed by design in what he did—that he told Wyatt that she was asleep and better, when it is claimed to have been proved that she was in fact worse. And it is urged that he made that communication to lull him into a false security—and that after his wife's death the prisoner declined to order a coffin, and it is claimed that his general conduct throughout the sickness of his wife was not such as evidenced affection or a desire to effect her recovery.

Without commenting on all the evidence bearing on this point (and there is evidence on both sides) it is enough for me to say that you must look carefully at the whole history

of the case, as detailed in the evidence, and say whether there did seem to be that anxiety and care on the part of the prisoner, which a husband would naturally exhibit in such a case. Two witnesses have been produced on the part of the defence who state that on one occasion he spoke of her as being very ill and cried—and that in one case after her death, he interfered to arrange her hair. On the part of the prosecution, they rely on other witnesses who were present all this time, more or less by the bedside of the sick woman, and it is claimed to have been shown that on the part of the prisoner, there was a marked absence of that care and anxiety which is expected in cases where there exists this relation of husband and wife, and which are always found where honesty of motive and sincere affection really exist. You must judge, from all the evidence before you (giving the prisoner in all cases the benefit of every reasonable doubt) whether his conduct was consistent with the relation in which he stood to the deceased.

Before you can convict the prisoner at the bar you must be satisfied not only that this woman was murdered by poison, but that the prisoner administered it to her with the design to take her life. This is indispensable to the crime of murder. It is claimed on the part of the prisoner that no such design could have been entertained—that the relations existing between the parties forbid the supposition; and it is urged that there was no adequate motive on his part, and that none had been proved for the commission of the offence. I think there can be no difficulty as to what the law is on this point. Your own common sense will lead you to a just conclusion. If you see one deliberately take the life of another, or if you have satisfactory evidence of the fact, doubtless there is a motive for the act. It is evident from the act itself. You see it done, under circumstances that forbid the possibility of accident. Where a murder is charged, and the evidence is wholly circumstantial, then it is always peculiarly proper to look at the motive. And in all cases, you will naturally seek for the motive. And where the proof is circumstantial, and there be doubt about the circumstances, then it becomes most impor-

tant to examine into the motive. If, however, the evidence of murder by design, be direct and positive, then the guilt is established without looking further. And in all these cases a question as to the adequacy of motive almost always arises. It is claimed generally that the motive is inadequate—that it is not sufficient to induce to the commission of murder. But all this must depend on the peculiar circumstances of each case, and the peculiar character of the accused. There is no motive which, to the mind of an honest man, can be adequate to the commission of crime; and just in proportion as the mind is debased and immoral, to that extent the motive may be less. That induces the criminal act. Hence there can be no one rule for all cases, as regards adequacy of motive. It must depend on the moral character of the person accused, in each case. The worse it is, the less the motive which will tempt it to the commission of crime.

It is urged, and very plausibly, on the part of the prisoner, that the relation existing between him and the deceased, forbids the supposition that he could have murdered her—that they were just married—and had barely entered on that important and interesting relation in life—and that it could not be supposed, under the circumstances detailed, that the prisoner could for a moment have entertained the idea of taking the life of the young woman, whom he had so recently sworn at the altar to love, cherish and protect. This consideration has weight, and you are to consider carefully this and all other circumstances favorable to the prisoner, and to give them their full and due weight, comparing them at the same time, with the other evidence in the case.

It is urged by the prosecution that the prisoner's acquaintance with the girl he afterwards married was of short duration—that he had known her but a few weeks—that in fact he married her a week before the time appointed. And it is claimed that the marriage was not agreeable to other members of his family. An attempt has been made on the part of the prosecution to introduce a letter alleged to have been written by the mother to the prisoner, after his arrest, and found in his possession. That letter has been excluded. It was improper

in counsel to allude to its contents on either side. You are to decide this case as if that letter was not in existence. You are to exclude it, if possible, from your minds if its contents or any part of them have come to your knowledge.

But it is claimed on the part of the prosecution that they have proved that there was a bad feeling existing on the part of the mother of the prisoner in regard to this marriage of her son. The proof is that on the Wednesday preceding the marriage, the mother of the prisoner came to Berlin, with his sister, and stopped at Mr. Streeter's tavern. That they remained there from morning until the afternoon of that day—that the mother sent for her son (the prisoner) and that he came to Mr. Streeter's—that mother and son and daughter were closeted together there—that the witness listened at the door, and then heard a remark made by the mother, casting suspicion on the character of the prisoner's wife, alleging that she understood what her character was in Troy, or something to that effect. Now, this is evidence—legitimate evidence. You are to say to what weight it is entitled. You have a right to refer to that, as well as other circumstances to see whether it is proved that in truth there was bad feeling on the part of the mother in relation to her son's marriage, that she regretted what had happened and disapproved of the marriage. And in corroboration of that it is urged and shown that the mother did not call on the deceased.

It is urged by the prosecution also that this match, thus hastily and prematurely entered into, did not indicate that desirable and abiding affection which is supposed to be incompatible with the feeling that induced the commission of this crime—and that a former attachment to Miss Godfrey (the same one that went with him after his marriage on the sleigh ride, still lingered about the prisoner, and prompted him, in connection with the interview with his mother, to the commission of the act for which he is arraigned. Look at the evidence, gentlemen, and see whether this is proved. You must look at this question of motive and give it due weight; because this is all a question of fact, and belongs to the jury

to decide. It is not proper that the Court should express an opinion, or attempt to control you in settling it.

On the part of the prisoner it is urged, and many witnesses have been introduced to prove, that up to the time of this occurrence, the prisoner sustained a fair character. Now, in case of doubt, this is very important evidence. If the evidence stood balanced, or nearly so, or if it admitted of doubt, it would be more satisfactory to know what had been the true character of the accused before—and he is entitled to the benefit of former good character. But if the crime be proved upon him to your satisfaction, then it is of no consequence what his character was. You have heard, however, what the witnesses have said on this point—what was drawn out on the direct and cross-examinations; and if this case be one of doubt in your minds, then you must resort to the question of character, and give to the prisoner all the benefit you shall think character entitled to in case of doubt.

I have thus called your attention to the prominent issues involved in this case. In all such cases, it is the rule of law—and it is a salutary one, which has prevailed from time immemorial—that if there be a reasonable doubt of the guilt of the accused, he is to have the benefit of that doubt. But by a reasonable doubt, I do not mean a bare possibility of innocence; because that may be true, in all cases. Even where a witness comes before you and swears that he saw a murder committed, there is a possibility that he swears to an untruth. I mean to say that if there be a conviction on your mind, from the evidence before you, that the prisoner is guilty—if in your hearts you feel that there is no reasonable question on that point, you must then find him guilty.

Throughout this whole trial it has been the intention of the Court to insure the prisoner a fair trial. In all questions of doubt as to the admissibility of evidence, the Court has been governed by views favorable to the prisoner. So with you. Where a circumstance is of a doubtful character, or doubtful in its bearings, you are to give the prisoner the benefit of the doubt. But where a fact is established, which leads the mind necessarily to the conclusion that he is guilty,

though there may be a bare possibility that he is innocent, still you must find him guilty.

In all these cases, gentlemen, there are appeals to the sympathies of the human heart—appeals which, if not made by counsel, grow out of the cases themselves. Our sympathies naturally tend in favor of the prisoners arraigned for capital offence. In this case, no doubt, you would gladly acquit, if you could. It is the natural tendency of the human heart. But you must bear in mind that mercy is not an attribute that belongs to Courts. We must pass upon the laws and the facts as they exist. We have nothing to do with sympathy in this case. If mercy is to be extended to the prisoner, it will be extended by a different tribunal. The Executive alone can interfere. And in this case, as in all others of great importance—in capital cases especially—it is urged that attempts have been made to operate on your minds by local appeals and prejudices, by influences other than those legitimately to be drawn from the testimony. I have no doubt you will guard against such influences. A high and solemn duty devolves upon you. I have no doubt you will meet it as becomes yourselves, though it be the most painful act of your lives. Probably this is the first time that you have been called upon to pass upon an issue so momentous; and I trust it may be the last. You are to soar above all extraneous influences, political and local—to discard everything foreign to the case before you. You are above it and beyond it. You have a high and holy duty to perform. You are to mete out justice with a firm and impartial hand; and under every obligation to your country, to your own consciences, and to God, to discharge your whole duty, without fear or favor. You have been told of the consequences of a wrong verdict in this case. You have nothing to do with conjectures and possibilities. You are to say, on your consciences and your oaths, whether, upon the evidence before you, the prisoner is guilty. If you discharge that faithfully, whatever may be the true state of the case, you can have hereafter no cause for regret. You will always be sustained by the reflection that you have faithfully discharged your duty according to the lights before you at the

time; and whether you acquit the guilty or convict the innocent, your consciences will tell you that you acted from an honest and firm purpose to discharge your whole duty.

I cannot close the discharge of the duty that devolves upon me without urging upon you the importance of agreeing upon a verdict. The case has occupied two whole weeks. A vast deal of time and money has been expended. The case has been very fully presented. Many witnesses have been examined, and most ably has the case been argued by counsel. You see, therefore, the great importance of endeavoring to agree on a verdict. Not that I anticipate any difficulty; but in all such cases I deem it my duty to present to the jury the importance of agreeing. And I must add, that you ought not, any of you, to place your minds in that fixed position that you cannot yield to conviction by reason and argument among yourselves; but rather cultivate a disposition to seek after, and arrive at, the truth. I have no doubt your duty will be most faithfully discharged—kindly towards the prisoner—weighing carefully the ingenious and able arguments used in his behalf—at the same time with a due regard to your consciences and the public interests. And whatever result you may arrive at, if you arrive at it under a full sense of duty faithfully discharged, it will be, it must be, satisfactory to all. It will be enough for you, however, to know that it is satisfactory to you yourselves and to your own consciences.

THE VERDICT AND SENTENCE.

The *Jury* retired and in an hour returned with a verdict of *Guilty*.

JUDGE PARKER: Henry G. Green stand up. Have you anything to say why the judgment of the law should not be pronounced against you.

Green (faintly): *Not guilty*.

JUDGE PARKER: That is adding nothing to what has been said before. That plea was put in for you by your counsel and the issue has been tried with every advantage on your part. You have had the advantage of very distinguished counsel, whose endeavors have been unremitting to secure your

acquittal. You have had the aid of rich and powerful friends—friends of high respectability and character, who have secured you every opportunity of presenting your whole case to the jury, fully and fairly.

Notwithstanding this an intelligent and honest jury have found you guilty, and it is not to be denied that there is no individual who has heard this trial that does not concur fully in the righteousness of that verdict. You stand condemned as guilty of having murdered your wife. Your case in all its aspects, exceeds in enormity any of which I have ever heard. It will no doubt stand out on the page of history the most criminal, awful case of murder that ever came before a court and jury.

You murdered her deliberately. You murdered the woman whom you had sworn but one short week, I may say but four days before, to cherish through life. The woman whose destiny had been placed in your keeping, in less than one week after marriage, you deliberately poisoned. You pursued your design, day and night—repeating the deadly potion from time to time until she expired—and thus added to the crime of murder, the black crime of perjury; for you violated the most solemn vow, taken at the altar.

Was it ever known that so interesting and holy a relation as that of man and wife has been followed thus soon by a result so shocking and sinful to all the feelings of our nature? Now, the law pronounces your sentence. You are to be executed; cut off in the prime of life, or rather just as you are entering on life; where you had rich and powerful friends to aid you; when you might have been respected; but from which you are to be cut off and consigned to an early grave. And those friends who have stood by you, will not share in the disgrace that awaits you. They have been disgraced more by your foul deed than by the ignominious execution which the law has provided for you.

We shall give you the extent of time, nearly, which the statute authorizes you to live. And this, that you may have opportunity to prepare for the fate which awaits you, and

that if errors have been committed in the course of the trial, that your counsel may avail themselves of it.

The judgment of the law is, that on Wednesday the 10th of September next, between the hours of 8 o'clock in the morning and 5 o'clock in the afternoon, you be taken to the place of execution, and there hanged by the neck until you be dead.

The *Counsel* for the prisoner gave notice of an appeal and asked that a bill of exceptions be duly approved.

JUDGE PARKER: Certainly; but I wish to say that the verdict of the jury is concurred in by the whole court. Of all the murders of which the books contain accounts or which the experience of our profession can recall, this is one so extraordinary in its audacity as to stand out on the page of history unapproached and unapproachable and unredeemed in unrelenting cruelty and horrid barbarity by one single palliating circumstance. It is a case which calls aloud for prompt punishment and no effort or ingenuity of counsel can or ought to save this culprit from the ignominious fate which the law has provided for such offenders.

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